UNIVERSITY OF KWAZULU-NATAL

A CRITICAL ANALYSIS OF SECTION 197 OF THE LABOUR RELATIONS ACT 66 OF 1995 AS AMENDED TAKING INTO CONSIDERATION THE ELEMENTS OF SECTION 197, THE DEFINITION AND CASE LAW

By
Chetna Soni
(Student No. 202501407)

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Supervisor
Ms Rowena Bronwen Bernard
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DECLARATION

I, hereby declare that this dissertation is my original work, and other works cited or used are clearly acknowledged. This work has never been submitted to any University, College or other institution of learning for any academic or other award.

Signed: ……..
Date: ……..

Supervisor:
Ms Rowena Bronwen Bernard, University of KwaZulu-Natal
Signed: …….
Dated: ……..

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ABBREVIATIONS AND ACRONYMS

CC	**Constitutional Court of South Africa**
CCMA	**Commission for Conciliation, Mediation and Arbitration**
ECJ	**European Court of Justice**
LRA	**Labour Relations Act 66 of 1995 as amended**
LAC	**Labour Appeal Court of South Africa**
LC	**Labour Court of South Africa**
SALGA	**South African Local Government Association**
SALGBC	**South African Local Government Bargaining Council**
SCA	**Supreme Court of Appeal of South Africa**

ABSTRACT

Section 197 of the Labour Relations Act 66 of 1995 regulates the transfer of a business as a going concern. However, it caused much debate and litigation. Previously, section 197 allowed for the automatic transfers of employees when there was transfer of the whole or part of a business, trade or undertaking. The employees could not refuse to be transferred.

There has been much debate and litigation on this issue, mainly on the issue of transfers in the context of outsourcing. This resulted in section 197 of the Labour Relations Act 66 of 1995 being amended in 2002. With the amendments, the new employer is automatically substituted in place of the old employer in respect of all contracts of employment. The section aims to protect employees against loss of employment while facilitating the transfer process.

Despite the amendment, there has been much academic and judicial debate on the issue. The Constitutional Court settled this issue in *Aviation Union of SA & another v SA Airways (Pty) Ltd & others* (2011) 32 ILJ 2861 (CC) wherein it was held that a transfer takes place when there is a termination of a service contract and the award of a new contract to a third party. The *Aviation* case sets a precedence and is being applied in various cases. For section 197 to apply, there must be a transfer of an identifiable business by the old employer to the old employer as a going concern. Each case must be determined on the facts.

The effects and conditions of transfers are further discussed stating the consequences that flow and the remedies available to employees. The conditions of the transferred employees should not on a whole be less unfavorable. This is further examined in the context of transfers within the South African Local Government structures and how the unions failed to utilize their power and collective bargaining to their advantage to ensure that they members were protected during the process.

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Chapter One
Introduction

1.1 Background

Mergers, acquisitions, take-overs and the sale of businesses are common features in business. Companies are increasingly restructuring to focus on the so-called 'core business,' and many services and functions, which were once provided 'in-house,' are being outsourced to service providers thus such services are outsourced for a fee in terms of commercial service agreements. In several instances, a company transfers businesses or parts of a business to another. Many provincial and local government departments have restructured and in the process underwent mergers and outsourced certain services.[1] These business decisions significantly affect issues such as security of employment.

Under the common law, "an employee can choose his or her employer, and the employer has the right to employ whom it wishes to employ. In the absence of the employee's consent, an employment contract cannot be assigned from one employer to another. In the absence of consent to a transfer, when an employer for some reason disposes of the business in which the employee is engaged, the employment relationship comes to an end, and the employee will have no right to continued employment by any new owner of the business. "[2]

Thus the common law position resulted in the loss of jobs upon the acquisition or transfer of a business. This situation is obviously detrimental to security of employment and resulted in negative consequences. The employees could be retrenched and left without employment unless the new employer chose to employ them; even then the terms of employment would be uncertain and frequently less favourable than those under which they had been employed. This resulted in the automatic transfer of all existing staff in section 197 transactions (employees were transferred without their consent) and the impracticality of transfer of collectivism in section 197 transfers.[3]

[1] Refer to chapter 6.
[2] A Van Niekerk *Law @work* 1st ed (2009) 299.
[3] M Beaumont 'Legislation and strategy: Labour Statutes – proposed changes,' (2000) *Beaumont Express* 313.

Section 197 of the Labour Relations Act 66 of 1995 ('the LRA') was enacted to address these problems, amongst others. The section aims to protect employees against loss of employment while facilitating the transfer process. The Constitutional Court in *NEHAWU v University of Cape Town & others*[4] stated that:

> "Section 197…relieves the employers and the workers of some of the consequences of the common law visited upon them, its purpose is to protect the employment of workers and to facilitate the sale of businesses as going concerns by enabling the new employer to take over the workers as well as other assets in certain circumstances. The section aims at minimising the tension and the resultant labour disputes that often arise from the sales of businesses and impact negatively on economic development and labour peace. In this sense, section 197 has a dual purpose. It facilitates the commercial transactions, while at the same time protecting the workers against unfair job losses."[5]

Human resources, such as the skills and experience of the employees of the former employer or corporate entity, are important components of a business and in many situations the new owner of the business may wish to retain such resources and thus re-hired many of the former employees.

Section 197 of the LRA has been enacted to protect the security of employment and facilitate the smooth transfer of businesses. Once a transfer in terms of s 197(1) of the LRA occurs, "all contracts of employment that existed immediately before the transfer took place are automatically transferred to the transferee (the 'new' employer), by operation of law, together with the business."[6] The transferee (the buyer/ new owner) replaces the transferor (the seller) as the employer party in respect of the contracts of employment and accepts all obligations of the previous employer. "The new employer also acquires the contractual rights of the previous employer."[7]

There has, however, been wide spread judicial and academic debate regarding transfers in the context of outsourcing. This was highlighted in the case of *NEHAWU v University of Cape Town* [8] wherein it was stated:

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[4](2003) 25 ILJ 95 (CC).
[5]At 118F-H.
[6] Section 197 (2) of the Labour Relations Act 66 of 1995.
[7]*Unitrans Supply Chain Solutions (Pty) and another v Nampak Glass (Pty) Ltd and Others* (2014) ILJ 2888 (LC) 7
[8]*NEHAWU v University of Cape Town* (2000) 7 BLLR 903 (LC).

> "Outsourcing involves the putting out to tender of certain services for a fee. The contractor performs the outsourced services and in return is paid a fee for its troubles by the employer …An outsourcing transaction is usually for a fixed period of time at the end of which it again goes out to tender and the existing contractor could lose the contract to another contractor."[9]

The most significant debate concerned, "whether there was a transfer of a business as a going concern occurred where A terminated the service contract or an outsourcing agreement with B, (the service provider) and concludes a new agreement with C, the new service provider."[10] The Constitutional Court in *Aviation Union of SA & another v SA Airways (Pty) Ltd & others* (2011) 32 ILJ 2861 (CC) (hereafter *Aviation*), held that a transfer takes place when there is a termination of service contract and the award of a new contract to a third party.

This thesis therefore aims to critically analyse the test set down by the Constitutional Court in the *Aviation* case, regarding a transfer as contemplated by section 197.

This thesis also considers transfers in the context of the large-scale restructuring that has occurred (and continues to occur) in the South African Local Government structures. In particular the issue of how organised labour dealt with the matter is critically examined. An attempt was made to look at solutions from the perspective of trade unions. This dissertation proposes that section 197 provides trade unions with a good opportunity to favourably influence the effects and consequences of transfers through informed collective bargaining. The critical issue is whether they failed to use this opportunity in the local government mergers specifically described and addressed in this research paper.

1.2 Research questions

This study has the following critical questions to answer, namely:

1.2.1 When does a transfer of a business as a going concern take place in terms of section 197 of the LRA?

1.2.2 Can the termination of a service or outsourcing arrangement that is subsequently awarded to a third party amount to a transfer as contemplated by section 197 of the LRA?

[9] *NEHAWU v University of Cape Town* (2000) 7 BLLR 903 (LC) at 30.
[10] *Aviation Union of SA & another v SA Airways (Pty) Ltd & others* (2011) 32 ILJ 2861 (CC).

1.2.3 What are the effects and conditions of a transfer on transferred employees?

1.2.4 What were the effects of specific transfers within the South African Local Government sector?

1.2.5 Can collective bargaining impact on transfers?

1.3 Objective

The overall objectives of this dissertation are:

1.3.1 To determine when a transfer of a business as a going concern occurs in terms of section 197 of the LRA.

1.3.2 To determine whether the cancellation and the subsequent awarding of an outsourcing agreement to a third party amounts to a transfer in terms of section 197 of the LRA.

1.3.3 To determine the effects and conditions of a transfer on transferred employees.

1.3.4 To determine the effects of specific transfers within the South African Local Government sector.

1.3.5 To determine whether collective bargaining impact on transfers.

1.4 Research methodology

The research method employed in this study was desktop research. Mostly desktop material was relied upon, this is information already published such as case law, journal articles, legislation and textbooks. Both primary and secondary sources of law were relied upon in this dissertation.

1.5 Significance of Dissertation

The significance of this study was to show that when a transfer in terms of section 197 of the LRA takes place, the termination of an outsourcing contract that is subsequently awarded to a third party amounts to a transfer in terms of section 197. This has been settled in law by the Constitutional Court in the *Aviation Union of SA & another v SA Airways (Pty) Ltd & others* (2011) 32 ILJ 2861 (CC), and *City Power (Pty) Ltd v Grindpal Management Services (Pty) and others* CCT 133/14 [2015] ZACC 8 and *City Power (Pty) Ltd v Grindpal Management Services (Pty) and others* (2014) 35 ILJ (LAC).

1.6 Structure of Dissertation

This dissertation consists of seven chapters. Chapter one provides a brief introduction of the law and cases that signified why the section 197 was amended whilst chapter two deals with the literature review wherein various academics views on the subject are examined. Chapter three considers the interpretation and application of section 197 of the LRA. It further discusses what amounts to a transfer of a business as a going concern in terms of Section 197. Case law is also analysed. Chapter four deals with service providers and outsourcing. Various cases are analysed. Chapter five focuses on the effects of a transfer and terms and conditions of a transfer. Chapter six deals with transfers in the local government sector and how collective bargaining plays a pivotal role. Chapter seven summarises the main points and provides the conclusion.

Chapter Two

Literature review: An analysis of section 197 of the Labour Relations Act 66 of 1995 and the Labour Relations Amendment Act 12 of 2002

2.1 Introduction

In this chapter, the literature and legislation on section 197 of the LRA is reviewed. This chapter focuses on the interpretation and application of section 197 of the Labour Relations Act, providing an evaluation of what the various authors have said on the issue.

Prior to dealing with the interpretation and application of section 197 of the Labour Relations Act, it is necessary to discuss the previous section 197 of the LRA. Section 197 of the Labour Relations Act came into effect on the 11 November 1996. However, its meaning and effect, produced considerable disagreements among commentators and labour courts.[11] In interpreting and applying section 197, the courts had a difficult time particularly in regard to outsourcing arrangements. This will be dealt with in greater detail below.

2.2 Section 197 of the Labour Relations Act 66 of 1995

Section 197 of the Labour Relations Act attempted to resolve what should happen to workers when a business, as opposed to a corporate entity owning a business, changed owners.[12] This was a problem which the previous labour regime grappled without resolution.

Section 197 of the LRA[13] consisted of five subsections. This section "altered the common law relating to the contractual relationship between an employer and employee when a business was sold."[14] Section 197 (1) "states that a contract of employment may not be transferred without the employee's consent unless the business is transferred as a going concern."[15] "Section 197 (2) of the LRA provides that if the business is transferred in terms of section 197

[11] C Todd, D du Toit, & C Bosch *Business Transfers and Employment Rights in South Africa* 1 ed (2004) 16.
[12] M Wallis, 'It's not bye-bye to 'By,' some reflections on Section 197 of the LRA,' (2013) 34 *ILJ* 780.
[13] Act 66 of 1995.
[14] W Blackie and F Horowitz, 'Transfer of Contracts of Employment as a result of mergers and acquisitions: A study of Section 197 of the Labour Relations Act 66 of 1995' (1999) 20 *ILJ* 1387.
[15] Section 197 (1) of the Labour Relations Act 66 0f 1995.

(1), then all rights and obligations would be transferred to the new employer."[16] The employees' consent was not needed "if the old employer is insolvent and being wound up, sequestrated or a scheme is under a scheme of arrangement to avoid insolvency or sequestration."[17] However, the terms and obligations can be changed by agreement. The third section states "that the agreement should be with an appropriate person or body referred to in section 189 (1)."[18] According to section 197 (4) the transfer of the business "does not interrupt the employee's continuity of employment."[19] The fifth and final section "provides that the liability of any person to be prosecuted, convicted or sentenced is not transferred to the new employer"[20].

This protected the employee in that their consent was needed before the transfer could take place. This section however only dealt with individual contracts of employment and not collective agreements. This meant that the new employer had free reign to utilize or renegotiate the collective agreements unless these agreements bound the new employer.

In terms of section 197 of the LRA[21] the employee could not refuse to be transferred with the business thus preventing the transferring employer from retrenching the employees and paying the employees severance packages. If the employee refused to be transferred then the employee would be without a job and the employer would have been liable to pay the employees a severance package. This resulted in further expenses for the employer.[22]

The employees could be transferred without prior consultation or consent if the transfer was a going concern.[23] The consent is unnecessary when the transfer is automatic.[24] This section 197 did not provide for outsourcing or subcontracting.

The negative features of this LRA was the automatic transfer of all existing staff and the impracticality of transfer of collectivism in section 197 transactions.[25] With the amendments,

[16] Section 197 (2) of the Labour Relations Act 66 of 1995.
[17] Section 197 (1) (b) of the Labour Relations Act 66 of 1995.
[18] Section 197 (3) of the Labour Relations Act 66 of 1995.
[19] Section 197 (4) of the Labour Relations Act 66 of 1995.
[20] Section 197 (5) of the Labour Relations Act 66 of 1995.
[21] Act 66 of 1995.
[22] J Grogan J, 'A twist on transfers: LAC reinterprets section 197' (2002) June *Employment Law* 9.
[23] Section 197 (1).
[24] J Grogan J, 'A twist on transfers: LAC reinterprets section 197' (2002) June *Employment Law* 9.
[25] Note 3 above, 313.

the new employer will now inherit the collective dynamics of the old employer including recognition agreements, arbitrations awards and extension of bargaining council agreements.[26]

Grogan has stated that "whenever an employer agrees to transfer the whole or part of its business to another employer, the new employer must take the employees of the transferring employer into its service whether or not it wishes to do so."[27] This means that the new employers have no "choice in the matter unless the employees of the transferring employer agreed otherwise, the business cannot be sold or transferred without the whole or affected part of the transferred business"[28]. Therefore the only way the "new employer could avoid taking over the old employer's employees was to decline to accept the transfer of the business".[29]

There has been much litigation in respect of this section. Discussed below are some of the important cases and the comments of learned authors. In *Schutte & others v Powerplus Performance (Pty) Ltd & another*[30] Seady AJ stated "that where the whole or part of the business, trade or undertaking was transferred by the employer as a going concern, the employment contracts of the employees would be automatically transferred to the transferee, which would become the new employer."[31]

She further held that:-

> "whether what is transferred is the whole or part of a business or undertaking as a going concern requires an examination of substance and not form, weighing factors that are indicative of a s 197 transfer against those that are not; treating previous cases as useful indicators, but not precedent and in this way deciding what is ultimately a question of fact or degree."[32]

In this case ensured the employees continuity of employment even though the employers changed. There were indeed many views regarding section 197. One view was that there would only be a compulsory transfer under section 197 (2) if the old employer and the new employer

[26] M Beaumont 'Legislation and strategy: Labour Law Changes- The consequences' (2002) 5 *Beaumont Services Beaumont Express* 148.
[27] J Grogan J, 'A twist on transfers: LAC reinterprets section 197' (2002) June *Employment Law* 9.
[28] Ibid.
[29] J Grogan J, 'A twist on transfers: LAC reinterprets section 197' (2002) June *Employment Law* 9.
[30] (1999) 20 ILJ 655 (LC).
[31] Note 12 above, 782.
[32] Note 12 above, 782.

agreed to such a transfer. A further view was that affected employees also had to agree to the transfer.[33]

The case that had an impact was *NEHAWU v University of Cape Town & Others*[34]. It was held that a transfer only takes place under section 197 if both the transferor of the business or undertaking and the transferee agreed that this would occur. The majority of the LAC went further and "held that there could only be a transfer of a going concern if the transferor and the transferee agreed that the existing staff (or some) were transferred."[35]

This decision was overruled by the Constitutional Court in *NEHAWU v University of Cape Town & others* 2003 (24) ILJ 95 (CC). The Constitutional Court held that section 197 resulted in the automatic transfer of the old employer's contracts of employment.

Without section 197, employees could resist being transferred to a new employer and could potentially hold the seller to ransom over a potential transfer of a going concern. At best "the "seller" would have had to consult over the transaction and at worst and in dispute whether, despite offers of alternative employment with the "buyer," the employees were entitled to severance pay."[36]

The CC found that the LAC was incorrect in its interpretation of section 197. The LAC erred in misrepresenting the meaning of "going concerns," in section 197 of the Labour Relations Act 66 of 1995 and ignoring the legislature's intention to protect jobs. The LAC decision rendered section 197 entirely voluntary: employers could escape its provisions by merely agreeing to exclude affected employees from the transaction.[37]

The CC found that "even though there was no agreement between the University and the outsource service providers to take over staff, this did not prevent the court from enquiring into and making a finding whether outsourcing was a transfer of a going concern."[38]

[33] Note 12 above, 783.
[34] [2002] 23 ILJ 306 (LAC).
[35] Note 12 above, 784.
[36] M Beaumont 'the real purpose behind section 197,' *Beaumont Services Beaumont Express* 346.
[37] J Grogan & J Gauntlett, 'Going Concern,' (2003) February *Employment Law* 18.
[38] M Beaumont, 'The real purpose behind Section 197,' *Beaumont Services Beaumont Express* 347.

Section 197 is "contemplated when the whole or part of the business is transferred as a going concern."[39] Section 197 prior to the amendments provided very little protection of employment security and employee rights in the process of business restructuring.[40] Employees were left powerless.

2.3 Section 197 of the Amendment Act 12 of 2002

2.3.1 Introduction

"Section 197 of the Labour Relations Act was amended to clarify the transfer of contracts of employment in the case of transfers of a business, trade or undertaking as a going concern."[41] There were difficulties in interpreting the section prior to the amendments. The amendments ensure that the section operates as was originally intended.

There was thus a need for a provision that facilitated business transfers as well as ensuring that the rights of employees were adequately protected.[42] Section 197 "must be interpreted to give effect to the spirit, purpose and objects of the Labour Relations Act and the Constitution."[43] The interests of the employers and employees must be balanced.

Section 197 was intended to be comprehensive and grant employers the benefits of not retrenching workers rendered redundant by the transfer of a business and not having to recruit new staff.[44] The amendments introduced a new batch of employee protections. It further provided flexibility by allowing employers to enter into agreements with trade union altering the terms of collective agreements to which the employers were party to.[45]

The amended section is very detailed and consists of ten sections. These sections will not be discussed in detail in this chapter as they will be referred in Chapter 3 and Chapter 5. Reference will only be made to the important sections.

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[39] Section 197 (1) (b) of the Labour Relations Act 66 of 1995
[40] C Bosch & Z Mohammed, 'Reincarnating the vibrant horse? The 2002 amendments and transfer of undertakings,' (2002) *Law, Democracy and Development,* Issue 1, Volume 6, 84.
[41] Note 12 above, 784.
[42] C Bosch, 'Balancing the Act: Fairness and Transfers of Business,' (2004) 25 *ILJ* 926.
[43] Constitution of the Republic of South Africa 1996 (1996 Constitution).
[44] J Grogan, 'Section 197 and outsourcing: No magic to outsourcing,' (2012) 28.2 Employment *Law* 5.
[45] Ibid.

2.3.2 The legal consequences of Section 197

Section 197 (1) and 197 A apply "when a business is transferred from one employer (the old employer) to another employer (the new employer) as a going concern."[46]

The requirements of section 197 are broadly stated. In a commercial environment, the nature and forms of commercial transactions are constantly changing, an attempt by the legislature to circumscribe the transaction that fall within the scope of section 197 with precision would most likely have the effect of excluding many employees from its protective reach.[47]

The retention of the phase "as going concerns," in the amended section 197 leaves the issue whether the outsourcing arrangements amounted to transfers of parts of its business as going concerns open for debate after the amendment came into force.[48]

The effect of the amendments is that the old employer does not require the consent of the employees before the transfer and neither are the employees retrenched. The employees are transferred and no dismissals take place.[49]

"In terms of section 197 (2), the new employer is substituted in the place of the old employer in respects of all contracts of employment in existence immediately before the transfer and all rights and obligations between the old employer and the employees at the transfer continue in existence as if there have been rights and obligations between the new employer and the each employee."[50] In terms of "section 197 (2) (c) of the LRA, any legal action carried out by the old employer before the transfer will be considered as carried out by the new employer except in insolvent circumstances."[51] In terms of section 197 (2 (d), "the transfer of the business will not interrupt the employee's continuity of employment and their contracts of employment continue with the new employer."[52]

[46] Section 197 (1) of the Labour Relations Act 66 of 1995.
[47] Note 11 above, 24.
[48] Grogan J, A twist on transfers: LAC reinterprets section 197' (2002) June *Employment Law* 9.
[49] Grogan J, 'A twist on transfers: LAC reinterprets section 197' (2002) June *Employment Law* 9.
[50] Note 36, above.
[51] Section 197 (2) (c) of the Labour Relations Act 66 of 1995.
[52] Note 48, above.

In light of the above, the old employer cannot use business transfers to circumvent liability for unlawful conduct.[53]

In terms of section 197 (3) "the new employer complies with subsection (2) if the employer transfers employees on terms and conditions that are on the whole not less favourable to the employees than those which they employed by the old employer."[54] This however does not apply if there is a collective agreement regulating the conditions of employment.

Section 197 (6) allows the employee to enter into an agreement with the employers and effectively alter the consequences of section 197 (2). Employers are further obliged to disclose information for effective negotiations.

2.3.3 Application of Section 197

The application of the section had three components which are: whether there is a transfer, whether what is being transferred constitutes the "whole or part of any business, trade or undertaking or service; and whether the subject matter of transfer matter is a going concern."[55]

These phrases are important in that if the entity that is transferred is not "part of a business or thereof, or if is not transferred as a going concern, the main consequences of section 197, namely the transfer of contracts of employment of the old employer do not occur by operation of law."[56] These phrases are discussed and defined in more detail below. It is important to discuss this as the section must be read in isolation.

a. Going concern

The new section 197 does not define what constitutes a going concern. However "section 197 applies whenever a business is 'transferred,' from one employer to another as a going concern."[57] The Constitutional Court's in *NEHAWU v University of Cape Town & others 2003* (24) ILJ 95 (CC) held that the test is objective which has regard to substance and not form. [58]

[53] Note 12 above, 784.
[54] Section 197 (3) of the Labour Relations Act 66 of 1995.
[55] C Bosch 'of business parts and human stocks: some reflections of section 197 (1) (a) of the LRA' (2004) *ILJ* 1865.
[56] J Grogan, *Dismissal* 1st ed (2010) 410.
[57] Note 11 above, 24.
[58] *NEHAWU v University of Cape Town & others 2003* (24) ILJ 95 (CC) 56.

Such an approach prevents employers from resorting to devices to avoid the application of the section in order to deprive employees of the protection afforded by section 197.[59]

"That being the case, purchasers and sellers of businesses "as going concerns" are at liberty to define what is included in that concept, and generally do."[60] Van Dijkhorst AJA said that with reference to the phrase "going concern" that the transfers contemplated by section 197 must,

> "necessarily include the employees and where the seller and purchaser negotiate and agree on a sale as a going concern of a business or part thereof, the necessary implication is that they agree that the employees or a material part thereof are part and parcel of the transaction."[61]

This provides the employers with an opportunity for their transactions to escape the provisions of section 197 by simply agreeing not to include all or most of the employees of the transferor.

Grogan stated that in determining whether a transaction "amounts to a transfer as a "going concern," is an issue that must be decided on the facts of each case."[62]

Todd *et al* has suggested "that a 'snapshot' must be taken of the entity prior to the transfer and an assessment and comparison of the business after the transfer must be done to establish whether what is in the hands of the transferee is the same business but in different hands."[63] This must be decided on the facts of each case.[64] Todd *et al* has further suggested "that the phrase going concern should not be literally taken in the sense that the business at the time of the transfer should actually operating."[65]

b. Business

Grogan wrote that, "the term includes every conceivable form of activity in which the employers engage, whether for profit or otherwise, and whether in private or the public sector."[66]

[59] Ibid 61.
[60] Note 48, above.
[61] Note 48, above.
[62] Ibid.
[63] Note 11 above, 49
[64] Note 11 above, 49.
[65] Ibid.
[66] J Grogan, Workplace law 10 ed (2009) 295.

According to Todd *et al:*

> "Business" and "trade" could be taken to indicate a commercial enterprise aimed at the generation of profit. But "undertaking" and "service" could also refer to entities of a non-commercial nature. The fact that section 197 is not limited in its scope to commercial ventures is reinforced by the fact that it applies to both private and public sector transfers. The scope of the definition of "business" is extended by the fact that what might constitute business for purposes of section 197 is not limited to the entities listed in section 197(1)(a). That much is apparent from the fact that for the purposes of section 197 a "business" *includes*, but is by implication not limited to, the entities specifically mentioned. The ambit of section 197 is further extended by the fact that it will not only apply to the transfer of the whole of a business, trade, undertaking or service, but also any part thereof. Business" is a rather chameleon-like word, "notorious for taking its colour and its content from its surroundings." What will constitute a business for the purposes of the application of section 197 necessarily relate to the particular facts of each case?"[67]

Business is defined as including the specified entities but is not limited to those. Wallis has stated that the addition of the word 'service,' to the former definition was included so that the definition should not be confined to commercial undertakings.[68] The definition of business makes it clear that the 'nature,' of the business might conceivably include a service.[69]

Wallis states that section 197 comes into play whenever there is transfer of, "an identifiable component or unit of a business, be it a division, a branch, a department, a store or production unit."[70]

The test by the European Court of Justice (hereafter ECJ) has been referred to in *Schutte & others v Powerplus Performance (Pty) Ltd & another* (1999) 20 ILJ 655 (LC). The ECJ held "that there will be a transfer of a going concern when there is a transfer of an economic entity that retains its identity after transfer."[71] This had been followed in recent cases, namely that of *Harsco Metals South Africa (Pty) Ltd & another v Arcelormittal South Africa (Pty) Ltd & others* [2012] 4 BLLR 385 LC. The various components of a business (tangible or intangible

[67] Note 11 above, 33.
[68] M Wallis 'Is Outsourcing In? An Ongoing Concern' (2006) 27 *ILJ 9*.
[69] A van Niekerk 'Bleached Skeletons Resurrected and Vibrant Horses Corralled – SAMWU v Rand Airport Management (Pty) Ltd & others and the outsourcing of services (2005) 26 *ILJ* 661, 665.
[70] Wallis M "Section 197 is the Medium: What is the message?' (2000) 21 *ILJ* 5.
[71] Note 37 above.

assets, goodwill, management staff, premises, name, workforce, contracts with particular clients etc) must be sufficiently linked and structured so as to be identifiable as a business.[72]

c. Transfer

The Constitutional Court in *NEHAWU* stated the following will be relevant to a transfer:

- "assets, tangible or intangible have transferred;
- whether or not workers are taken over
- whether customers are transferred
- whether or not the same business will be conducted by the 'buyer or new employer."[73]

A transfer can be defined as "the transfer of a business by one employer (old employer) to another employer (new employer) as a going concern."[74]

Wallis has stated that the definition of a transfer contemplates "two positive actors in the process, namely the old employer and the new employer; and there must be an identifiable business which includes a part of the business that must be the subject of the transfer by the old employer to the new employer."[75]

2.4 Outsourcing

It is important to refer to outsourcing as in many cases, agreements have been terminated due to outsourcing. Transfers can take place in many forms and one such form is outsourcing.

Wallis has stated that outsourcing is not a form of art, instead, its form is protean and the term is used to describe a range of very different transactions.[76] Wallis has further commented that outsourcing is 'in' whenever an organization perceives that it is to their advantage to engage in it.[77]

[72] Note 11 above, 33.
[73] *NEHAWU v University of Cape Town & others 2003* (24) *ILJ* 95 (CC).
[74] Note 39, above.
[75] Note 70 above, 10.
[76] Note 12 at 794.
[77] Note 70 above, 8.

Outsourcing occurs when an employer contracts out with a service provider to take over a particular function of its business rather than employ its own personnel.[78] The contractor is paid a fee for providing a service. Outsourcing is preferred by businesses as it is less costly in that expenses are reduced.

According to Grogan those who are opposed to outsourcing contend that it's merely a device for employers to evade their obligations under labour legislation and those in favour argue that it enables employers to get on with their core businesses unhampered by supplying and managing essential marginal activities.[79]

Second generation outsourcing occurs "where there is a change in the service provider of the service being rendered"[80].

COSAWU v Zikhethele Trade Pty (Ltd)[81] was an important judgment in that it related to what is an increasingly prevalent form of business restructuring and touches on fundamental issues relating to the proper interpretation of the LRA.[82] It dealt with second generating outsourcing.

In this case, the Fresh Produce Terminal contracted with Khulisa Terminal Services to provide stevedoring services at harbours in Durban, Cape Town and Port Elizabeth. Fresh Produce terminated its contract with Khulisa and then invited factions within Khulisa to apply for the contract. Khulisa split and two new entities were formed. One was Zikhethele who tendered and was awarded the contract. The workers claimed that they should have been automatically transferred to Zikhethele who was awarded the contract which was previously awarded to their employer. The company refused as there was no transfer of business from Khulisa to Zikhethele because the two entities were different. The court had to decide whether a transfer took place. The court described the situation as second generation contracting out. This was the where the word "by" came in which denoted an active part in the transfer of the business.[83] The judge preferred a more purposive approach and noted that "section 197 (1) (b) might be better

[78] Note 11 above, 25.
[79] J Grogan "Bye-Bye to 'bye' Section 197 and second generation outsourcing' (2011) *Employment Law* 11.
[80] Note 11 above, 26.
[81] [2005] 9 BLLR 924 (LC).
[82] C Bosch C 'Aluta Continua or closing the generation gap: section 197 of the LRA and its application to Outsourcing,' (2007) 2 Volume 28 *Obiter* 84.
[83] Note 12 above, 784.

interpreted to apply to transfers 'from' one employer to another as opposed to only those affected 'by the old employer.'"[84]

Grogan indicated that the preposition "by" suggests that the old employer must effect the transfer, which clearly does not occur when the first contractor drops out of the picture because the principle decides usually without the first contractor's consent that the services will henceforth be performed by another contractor.[85]

Applying section 197, the court "held that based on the facts, there was a transfer of a business as a going concern from Khulisa to Zikhethele."[86] The court held "that the transfer took place in two phases – in the first phase the business was handed back to the outsourcer client, and in the second phase, it was awarded to the incoming contractor."[87] The new contractor was declared the employer.

The case of *SAMWU v Rand Airport Management Co (Pty) Ltd and others*[88] concerned a proposal to outsource parts of the business from the employer to the subcontractor. The court relying on "the inclusion of the word "service," in the new definition of "transfers of business," held that outsourcing of the company's gardening services and security could in principle constitute transfers of parts of its business as going concerns and trigger the remaining provisions of section 197"[89].

Wallis stated that a transfer must involve a positive act by the old employer amounting to a transfer by the new employer and warned against relying on European and Canadian case law as the legislation was different.[90]

In *Aviation Union of SA & another v SA Airways (Pty) Ltd & others* (2011) 32 *ILJ* 2861 (CC), SAA decided to outsource its infrastructure and support services to LGM. SAA cancelled the contract in June 2011 when a material change in ownership occurred. The union sought a

[84] Note 12 above, 785.
[85] J Grogan & J Gauntlett, 'Second generation outsourcing: the reach of Section 197,' (2005) October *Employment Law* 10.
[86] Note 82, above 87
[87] Note 82, above 87, 88.
[88] [2005] 3 BLLR 241 (LAC).
[89] Note 79, above.
[90] Note 12 above, 785.

guarantee that the employees would be transferred back to SAA. When SAA refused to take the employees back the union took the matter to court. The matter reached the Constitutional Court which found for the union.

The "old employer is a positive actor in the process."[91]

"This is not what occurs when an institution for instance has concluded a contract for the provision of cleaning services and at the expiry puts it out to tender and the existing contractor loses the tender."[92]

"In those circumstances the role and function of the old employer is to strive to keep the contract not to transfer all or any part of the business to someone else."[93]

Wallis indicated that the point becomes controversial because of its perceived implications for "a second generation contracting out" where the contractor who had been providing an outsourced service lost the contract to another contractor.[94]

According to Bosch as cited by Wallis,

> "This occurs where the contractor who has been providing an outsourced service loses the contract to another contractor. It has been suggested that s 197 cannot apply in such circumstances because it is applicable to transfers "by" the old employer to the new employer. The idea is that the old employer, in this case (the outgoing contractor) does not transfer the business to the new employer (the incoming contractor). That function is fulfilled by the party that outsourced the service. Accepting this view would entail that second generation contracting out has a blanket exclusion from the application of s 197. That, it is submitted, would be a very unsatisfactory situation. Employees would be denied access to the protections of s 197 because of what is apparently a drafting oversight."[95]

[91] Note 12 above, 797.
[92] Grogan 'Applying Aviation Union: Another case of second generation outsourcing,' (2012) 28.3 Employment *Law* 12.
[93] Note 92, above.
[94] Note 12 above, 785.
[95] C Bosch 'Balancing the Act: Fairness and Transfers of Businesses' 2004 25 *ILJ* 930.

Wallis argued that Bosch acknowledged that the use of the word 'by' "indicates some action on the part of the old employer in transferring all the relevant parts of the entity concerned."[96] He highlighted the problem of the constitutional sufficiency of section 197 and suggested it was 'arguably deficient' because the limitation of its scope, implicit in requiring that the old employer play an active role in the transfer, might not give sufficient protection to employees' rights to fair labour practices. In that context he suggested that a constitutional challenge could result in the words 'or from' being read into the section to render it constitutionally compliant.[97] Wallis stated the provisions of the contracts relating to what was to occur in its termination was of utmost importance to the outcome of the case. He indicated that the outcome of the case did not turn upon the meaning or effect of the word 'by,' but upon its own particular (and peculiar) facts as the different judges viewed the same set of facts differently.[98] In essence, "the transfer must be 'by,' the old employer."[99]

The significance of the CC judgment from a legal perspective is that it disposed (by a narrow majority) of the view that the clear wording of the section could or should not be altered by way of interpretation and helped also to "clarify that it is not outsourcing as such or generation of the outsourcing that matters but whether there has been a transfer of the whole or part of the business, undertaking or business as a 'going concern.' "[100]

Wallis agreed with Yacoob J that in some circumstances the business may be transferred from the original outsourcing contractor back to the principle before being transferred again to the new contractor.[101]

In regard to outsourcing, there is no clear application of section 197 and every case will depend on its own facts.

Wallis went on further to say that the CC judgment has compounded the problems of section 197. The majority judgment in the CC with its "stress on the need for the transfer of the whole or part of the business as a going and the distinction drawn between that situation and the one

[96] Note 12 above, 786.
[97] Note 12 above, 786.
[98] Note 12 above, 792.
[99] Note 12, above 793.
[100] Note 12 above, 796.
[101] Note 12 above, 796.

where the contractor changes a contract for the provision of a service, created further difficulties in invoking section 197 in the run of the mill outsourcing situation."[102]

Grogan states that the CC majority judgment simply circumvented the issue raised by the word "by," and subsumed section 197 (1) (b) into a contextual or functional interpretation of section 197 as a whole. "The majority accepted that the word "by," in section 197 (1) (b) must be accepted as meaning, "by," in the active sense and that the word cannot mean anything akin to "form""[103]

In *Aviation*, the initial transfer was initiated by the principal, section 197 applied to the first transaction by agreement and the first contractor was obliged to return the business back to the principle before the service was put out to tender again. The question that remains is to what extent do these features need to vary to release parties to a "second generation" outsourcing arrangements from the obligations imposed by section 197 will depend on the facts of future cases.[104]

The CC judgment stated that section 197 applies in cases of second and further generation outsourcing arrangements.

Grogan in applying *Aviation* to the *Harsco Metals South Africa (Pty) Ltd & another v Arcelormittal South Africa (Pty) Ltd & others,*[105] case, stated that the *Harsco* judgment crosses some of the t's and dots few of the i's of the *Aviation* judgment and possibly expands on the ambit of Section 197.[106]

Neil Coetzer and Rod Harper,[107] analysed recent case law in light of the *Aviation* case. He referred to the cases of *Harsco Metals South Africa (Pty) Ltd & another v Arcelormittal South*

[102] Note 12 above, 797.
[103] J Grogan 'Section 197 and outsourcing: no magic to outsourcing' (2012) 28.2 Employment *Law* 5.
[104] Ibid.
[105] [2012] 4 BLLR 385 LC.
[106] Grogan 'Applying Aviation Union: Another case of second generation outsourcing,' (2012) 28.3 Employment *Law* 12.
[107] N Coetzer and R Harper, 'Interpreting Section 197 after Aviation Union of SA v SA Airways – An analysis of recent case law relating to transfers of undertakings,' (2013) 34 *ILJ* 2506.

Africa (Pty) Ltd & others,[108] *Franmann Services (Pty) Ltd v Simba (Pty) Ltd and Another,*[109] and *Grindpal Energy Management Services (Pty) Ltd v City Power Johannesburg (Pty) Ltd & others*[110]. In their analysis, they stated that the *Aviation* judgment has "created the unintended and incorrect perception that section 197 applies to all transactions."[111] They compared the minority judgment of Jafta J and the majority judgment of Yacoob J. The *Aviation* judgment simply requires that each transaction be scrutinized to determine whether section 197 applies to a specific set of circumstances which is fact driven. The CC has been prudent in stating that the list of factors which "are indicative of a section 197 transfer are not exhaustive; and must be judged on its merits"[112].

"The takeover of employees and/or assets from the transferring entity is a critically important factor to consider and cannot be underestimated which is clearly highlighted in the *Harsco* and *Franmann* matters."[113]

2.5 Conclusion

Section 197 was amended to provide clarity but has created much debate in respect of second generation outsourcing.

In conclusion, the research reveals the problems associated with section 197 and how courts have interpreted this section. The amended section provides more protection to employees. Despite the amendments, there has still been some difficulties in the interpretation and application of section 197 particularly with regard to outsourcing. What is critically important is that the interests of both the employer and the employee must be balanced. The courts therefore have a duty to interpret the legislation in a fair manner.

"If the provisions of section 197 are properly utilized, it should not have the effect of hamstringing employers or inhibiting business transfers, as it contains numerous mechanisms

[108] *Harsco Metals South Africa (Pty) Ltd & another v Arcelormittal South Africa (Pty) Ltd & others*[2012] 4 BLLR 385 LC.
[109] (2013) 34 ILJ 897 (LC).
[110] (2013) 34 ILJ 905 (LC).
[111] Note 107, above 2511.
[112] Note 107 above, 2512.
[113] Ibid.

that enable parties to ensure that it operates in a manner that is the best interests of employers and employees."[114]

Section 197 therefore applies to outsourcing and second generation contracting out. All the cases have reiterated that the test "is an objective one and regard must be given to the substance and not the form of the transaction."

[114] Note 55 above, 1882.

Chapter Three

The interpretation and application of section 197 of the LRA

3.1 Introduction

The issue that is examined in this chapter is what amounts to a "transfer of a business as a going concern in terms of section 197 of the LRA, that is, whether in a particular business/commercial event there was a transfer of a business as a going concern." [115] This requires an examination of the elements that must be simultaneously present for a transaction to be deemed a transfer of a business as contemplated by section 197 of the LRA.

In this chapter, the *Aviation Union of SA & another v SA Airways (Pty) Ltd & other (*2011) 32 *ILJ* 2861 (CC) and *Harsco Metals South Africa (Pty) Ltd & another v Arcelormittal South Africa (Pty) Ltd & others* [2012] 4 BLLR 385 LC will be analysed to illustrate the interpretation and application of section 197 of the LRA.

The Constitutional Court in *Aviation*[116] noted that the correct approach to the interpretation of legislation was relevant to the proper interpretation of section 197.

3.2 *Aviation Union of SA & another v SA Airways (Pty) Ltd & other*[117]

This case is important as it dealt with the issue of whether a second generation outsourcing agreement amounted to a transfer of a business as a going concern.

In 2000, "South African Airways (SAA) took a decision to outsource non-core service to reduce its maintenance costs."[118] A tender was put out and the contract was awarded to LGM South Africa Facility Managers & Engineers (Pty) Ltd (LGM). SAA and LGM concluded an outsourcing agreement. In terms of the agreement, "LGM would provide the services for a fee, the contracts of employment would be transferred to LGM in terms of section 197, LGM would purchase the assets and inventory and SAA would be entitled to repurchase these assets upon termination, LGM would be given use of the office space, workshops, SAA network and

[115] Section 197 (1) (b) of the Labour Relations Act 66 of 1995.
[116] *Aviation Union of SA & another v SA Airways (Pty) Ltd & others* (2011) 32 *ILJ* 2861 (CC).
[117] Ibid.
[118] Note 116 above, 6.

computers, and upon termination of the agreement, the services would be transferred back to it or a third party."[119] The agreement was for 10 years with SAA retaining the option to renew it for five years. SAA could cancel the agreement if "there was a material change in LGM's ownership." SAA terminated the outsourcing agreement as LGM committed a breach. They called for tenders for services previously performed by LGM. LGM wanted to retrench employees that came from SAA. SAA stated that it would not take back the employees. LGM refused to give an undertaking "that it would not terminate the employment of its members when the agreement ended." [120]

The issue before the court was whether the employees of LGM were "transferred in terms of section 197 together with the business to another employer (SAA or new party) upon the termination of the outsourcing agreement between SAA and LGM."[121]

The Labour Court held that a "transfer must be facilitated by an old employer to a new one for section 197 to apply. In light of the word 'by' it held that section 197 cannot be construed in a way that makes it apply to a transfer 'from' one employer to another as opposed to a transfer 'by' the 'old' employer to the 'new' employer."[122]

"It found that in a second outsourcing agreement the old employer, which it regarded as the party that initiated and effected the first transfer, does not play the same role."[123] Thus the Labour Court ruled against the union.

The LAC rejected what it viewed as a "literal meaning adopted by the Labour Court."[124] The LAC "[125]rejected the proposition that the word "by" supports exclusively the connotation that the transferor must play an immediate and positive role in bringing about transfer." Instead the LAC preferred the purposive approach to legislation "that would advance the purpose of job protection, as opposed to an interpretation that denies protection to employees."[126]

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[119] Note 116 above, 8.
[120] Note 116 above, 12.
[121] Note 116, above 2.
[122]*Aviation Union of SA & others v SAA (Pty) Ltd & others* (2008) 29 *ILJ* (LC) 32; *Aviation Union of SA & another v SA Airways (Pty) & Ltd others* (2011) 32 *ILJ* 2861 (CC) 17.
[123] Ibid.
[124]Note 116 above 21.
[125] Ibid
[126] Aviation Union of SA obo Barnes & others v SA Airways (Pty) Ltd & others [2010] 1 BLLR 14 (LAC) 30.

In the majority decision, the SCA stated "that the LAC distorted the plain meaning of section 197 by interpreting the word "by" to mean "from.""[127] The SCA held that "by using the word 'by,' indicates that the transferor has a positive role to play in bringing about the transfer." [128] The legislature deliberately limited the scope of this section to those transactions where two parties decide to bring about a change in ownership of a business by whatever means.[129] The SCA decision was interpreted to mean that section 197 is not capable of covering second generation outsourcing (which will be discussed in this chapter). The LAC decision interpreted "by" as "from" so section 197 was capable of covering second generation outsourcing.

The Constitutional Court was clear and ruled "that section 197 applies to any transaction that transfers a business as a going concern and that the SCA was incorrect in ruling that section 197 does not apply to second generation outsourcing agreements."[130]

The Constitutional Court stated "that section 197 applies to any transaction that transfers a business as a going concern whether "by," or "from," the old employer to the new employer."[131] Yacoob J (majority judgement) stated that SAA did more than effect the outsourcing of an agreement. The service was transferred. LGM received the "fixed assets, use of space at all airports, SAA computer networks services and the lease of property."[132] LGM acquired all the infrastructure necessary to conduct the business.[133]

In response to whether there was transfer of a business or outsourcing of a service to SAA or a third party, the court stated that the assets would not be kept by LGM.[134] Reference was made to the terms and conditions of the agreement.[135] LGM was "obliged to sell all fixed assets to SAA, provide SAA with reasonable access to the services, inventory and assets."[136] Upon the cancellation of the contract, LGM would not be entitled to the use of the property and leases.[137]

[127] *South African Airways (Pty) Ltd v Aviation Union of South Africa & others* [2011] 2 BLLR 112 (SCA).
[128] Ibid 31.
[129] Ibid.
[130] Note 116 above.
[131] Note 116 above.
[132] Note 116 above, 120.
[133] Note 116 above, 120.
[134] Note 116 above, 122.
[135] Note 116 above 119 and 121.
[136] Note 116 above, 123.
[137] Note 116 above 123.

LGM would not have been able to "conduct the business upon the cancellation of the agreement."[138]

Section 197 is triggered on the facts when there is a "transfer of the whole or part of the business as a going concern by one employer to another. The cancellation of the business contemplated a transfer as a going concern."[139]

The Constitutional Court in *Aviation Union* stressed that "section 197 activated when there is a transfer of business as a going concern."[140] The application of section 197 is determined by referring to three important requisites namely, "business, transfer and going concern." These will be discussed below.

3.3 Section 197 defined

In order for section 197 to apply:-

(a) "There must be an identifiable business;
(b) There must have been a transfer;
(c) The business must be transferred as a going concern.[141]

All three elements must be established to show that section 197 applied. Section 197 will therefore not apply even if one can show that a business was transferred as a going concern.[142] Below is a brief discussion of the above three components highlighted in the *Aviation* case.

3.4 Business

It is important to define and analyse what constitutes a business as it will apply where the entity that is being transferred constitutes a business as defined in section 197 (1) (b).[143]

[138] Note 116 above, 123
[139] Note 116 above 124.
[140] Note 116 above, 71.
[141] *Aviation Union of SA & another v SA Airways (Pty) Ltd & others* (2011) 32 *ILJ* 2861 (CC) 44.
[142] Note 116 above, 71.
[143] Note 11 above, 32.

"Although the definition of business in section 197(1) includes a service, it must be emphasized that what is capable of being transferred is the business that supplies the service and not the service itself."[144]

The Constitutional Court in *Aviation* [145] stated that "the term business includes the whole or part of any business, trade or undertaking or service; any conceivable form of activity in the private or public sector in which the employer engages for profit or otherwise and any service provided in exchange for money."[146] The word business should not be limited.

3.5 Transfer

It is important to define transfer as it's pertinent to the application of section 197. According to *Aviation,*[147] a transfer "occurs when the business changed hands, through a sale or other transaction that places the business in different hands."'[148]

"The transfer of a business must be determined in light of the facts of each case."[149] The "original components of the business must be passed to the third party which maybe in the form of assets and employees who possess the skill and expertise."[150] The new employer may require the employees as it may not have the workforce.[151]

3.6 Going concern

The Constitutional Court in *Aviation* then turned its attention to the required element of 'going concern' and the test for determining "whether a business was transferred as a going concern."[152] The court stated "if the transaction in terms of which a business is transferred specifies that it is or will be transferred as a going concern, it would constitute sufficient proof of that fact."[153] However, the transfer as a going concern comes into existence with reference to the objective facts. According to the Constitutional Court in *Aviation*, the case of *NEHAWU* "makes it clear that what matters during the factual inquiry is the substance of the transaction

[144] Note 116 above, 52.
[145] *Aviation Union of SA & another v SA Airways (Pty) Ltd & others* (2011) 32 *ILJ* 2861 (CC).
[146] Ibid 43.
[147] Ibid.
[148] Note 116 above, 46.
[149] Note 116 above, 47.
[150] Note 116 above, 48.
[151] Ibid 48.
[152] *Aviation Union of SA & another v SA Airways (Pty) Ltd & others* (2011) 32 *ILJ* 2861 (CC).
[153] Ibid 49.

and not its form."[154] The Court emphasized that "each case must be determined on its own merits and that special attention must be paid to specific factors which are capable of illuminating the nature of the transaction under scrutiny. The listed factors are not exhaustive and none of them is decisive of the issue."[155] According to the CC:

> "The test for determining whether a business was transferred as a going concern or not was laid down by this Court in *NEHAWU* (supra). There the court said:
> "The phrase 'going concern' is not defined in the LRA. It must therefore be given its ordinary meaning unless the context indicates otherwise. What is transferred must be a business in operation 'so that the business remains the same but in different hands'. Whether that has occurred is a matter of fact which must be determined objectively in the light of the circumstances of each transaction. In deciding whether a business has been transferred as a going concern, regard must be had to the substance and not the form of the transaction. A number of factors will be relevant to the question whether a transfer of a business as a going concern has occurred. What must be stressed is that this list of factors is not exhaustive and that none of them is decisive individually. They must all be considered in the overall assessment and therefore should not be considered in isolation. There is nothing either in the context or the language of s 197 to suggest that the phrase 'going concern' must be given the meaning assigned to it by the majority. On the contrary, the purpose of the section and the context in which that phrase occurs suggests otherwise."[156]

The "following factors need to be considered in determining whether there has been a transfer of a business as a going concern- whether assets both tangible (tools, vehicles, equipment etc) and intangible (goodwill, branding, systems, know-how etc) have been transferred, whether the business utilises the same suppliers, whether the business operates from the same premises, whether customers and workers have been taken over and whether or not the same business is carried on by the new employer."[157]

3.7 *Harsco Metals South Africa (Pty) Ltd & another v Arcelormittal South Africa (Pty) Ltd & others* [2012] 4 BLLR 385 (LC)

This case was decided after the *Aviation* case and has been analysed to show how the courts have applied the *Aviation* case and interpreted section 197 of the LRA.

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[154] Note 116 above, 50.
[155] Note 116 above, 51.
[156] *Aviation Union of SA & another v SA Airways (Pty) Ltd & others* (2011) 32 *ILJ* 2861 (CC) 50.
[157] A Freund, P Le Roux & C Thompson, *Current Labour Law 2012: The Authoritative Annual Review of Labour Law* (2012) 47.

Harsco Metals South Africa "provided slag management and processing services to Arcelormittal South Africa Limited in terms of the service agreements, and in doing so operated four sites, at Vanderbijlpark, Saldanha, Newcastle and Vereeniging."[158] It employed a total of 445 employees. Harsco had provided services for the past 40 years to AMSA. The agreement between them was due to expire in December 2011. Prior to the expiry of the contract Arcelormittal put out a tender. Harsco, Phoenix and Tube City submitted tenders. Harsco was awarded the contract at the Vanderbijlpark, Phoenix and Tube City were awarded the tenders for the other six plants. Harsco sought an order declaring that the business transferred to Phoenix and Tube City "as a going concern."[159]

In terms of the arrangement, AMSA would purchase certain assets from Harsco which would be sold to Phoenix and Tube City. The "balance of the assets was to be provided by the incoming service providers."[160] Both Phoenix and Tube City "performed substantially the same services as those performed by Harsco and at the same locations."[161] Harsco provided services "for a limited period at Vanderbilpark and Newcastle to ensure a smooth handover to the new contractors."[162] Harsco retained its head office and two site managers. Phoenix and Tube City employed 300 of Harsco's 445 employees. The issue before the court was "whether there was a transfer in terms of section 197 when the service agreement between Harsco and Arcelormittal terminated and Phoenix and Tube City replaced Harsco as the new service providers."[163]

AMSA, Phoenix and Tube City "argued that the cancellation of the service contracts at the end of 2011 was a transfer in terms section 197 of the LRA."[164] The argument was "that the initial transactions comprised a contracting out by AMSA with Harsco."[165] Further the "initial transaction did not involve a transfer of a business as a going concern from AMSA to Harsco."[166]

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[158] *Harsco Metals South Africa (Pty) Ltd & another v Arcelormittal South Africa (Pty) Ltd & others* [2012] 4 BLLR 385 (LC) 8.
[159] *Harsco Metals South Africa (Pty) Ltd & another v Arcelormittal South Africa (Pty) Ltd & others* [2012] 4 BLLR 385 (LC) 1.
[160] Note 158 above 9.
[161] Note 158, above, 9.
[162] Note 158, above 9.
[163] Note 158, above 1.
[164] Note 158 above 17.
[165] Note 158 above 17, 18.
[166] Note 158 above 17.

The court relied on the *Aviation* case which stated that the "true enquiry was whether there was a transfer of business as a going concern from the old employer to the new employer."[167] The legal approach in *Aviation* was that "section 197 is triggered when on the facts there is a transfer by one employer to another, in circumstances where the transferred entity is the whole or part of a business, and where the business (or part of it) is transferred as a going concern."[168]

"If the transfer meets these criteria which should be determined objectively, the transferee is substituted automatically and by operation of law for the transferor as the employer of those transferor's employees engaged in the business as of date of transfer."[169]

The enquiry was threefold and one had to show that there was a "transfer by one employer to another, of the whole or part of the business and that the business was transferred as a going concern."[170]

Van Niekerk J referred to *SAMWU & others v Rand Airport Management Co Ltd and others* (2005) 3 BLLR 241 (LC), and stated that it was authority for the definition of business.[171] The court "concluded that the outsourcing of gardening and security functions at an airport were businesses capable of being transferred in terms of section 197."[172]

"No assets, goodwill, operational resources or workforce were transferred."[173] There was "no distinction drawn between a business that is largely employee-reliant, as opposed to an asset-reliant business."[174] What was transferred was "unskilled employees and the work they performed"[175]. This was "a 'business' for the purposes of section 197."[176]

[167] Note 158 above, 12.
[168] *Harsco Metals South Africa (Pty) Ltd & another v Arcelormittal South Africa (Pty) Ltd & others* [2012] 4 BLLR 385 (LC) 15.
[169] Ibid 15.
[170] Note 158 above, 13.
[171] Note 158 above, 27.
[172] *SAMWU & others v Rand Airport Management Company (Pty) Ltd & others* (2005) 3 BLLR 241 (LAC).
[173] Note 158, above, 27.
[174] Note 158, above 27.
[175] Note 158 above
[176] Note 158, above 27.

Applying the above, Van Niekerk J stated that "Harsco's business operations conducted pursuant to the service agreements concluded with AMSA was an economic entity capable of being transferred."[177]

"An economic entity is defined as 'an organised grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective'"[178].

In deciding whether the business transferred as a going concern, Van Niekerk referred to *COSAWU* v *Zikhethele Trade (Pty) Ltd* [2005] 9 BLLR 924 (LC) wherein Murphy J held that after the transfer the economic entity remains identifiable and not necessarily identical despite changes.

Van Niekerk J referred to *Christel Schmidt v Spar- und Leihkasse der früheren Ämter Bordesholm, Kiel und Cronshagen* (Case C-392/92, (1994)), wherein the "European Court of Justice held that the absence of tangible assets does not preclude the existence of a transfer."[179]

"AMSA would have remained the sole recipient of services and Phoenix and Tube City performed substantially the similar services to those performed by Harsco at the same locations indicates the continuation of a discrete economic entity in different hands."[180] No intangible assets (goodwill, intellectual property and operational methodology) was transferred.[181] Harsco did not purchase the immovable assets while Arcelormittal purchased the movable assets. It was further not an overriding factor that Phoenix and Tube City would not take transfer of the plants. Applying the factual circumstances, "it was held that the section 197 applied to the termination of the service agreements between Harsco and Arcelormittal."[182]

3.8 Analysis

It is abundantly clear that the *Aviation*[183] judgement has had a significant impact on how courts interpret and apply section 197. A balance is struck between the protection of employees and the facilitation of transfers.

[177] Note 158 above, 39.
[178] *Suzen v Zehnacker Gebaudereinigung GmbH Krankenhausservice* [1997] IRLR 225.
[179] Note 1583 above, 32.
[180]Note 158 above, 34.
[181] Note 158 above, 35.
[182] Note 158 above 39.
[183] *Aviation Union of SA & another v SA Airways (Pty) Ltd & others* (2011) 32 *ILJ* 2861 (CC).

It is submitted that the *Aviation*[184] and *Harsco*[185] judgements are correct in that each case should be decided on its facts and merits. The courts in both cases interpreted and applied section 197. One only has to show that a transfer has taken place "from the old employer to the new employer and that the same or similar business is being transferred as a going concern."[186]

What further needs to be considered "is the extent to which the assets (tangible and intangible) are transferred, whether employees are taken over by the new employer, have customers being taken over, is the new employer using the same premises and the same facilities."[187] If more than one of the elements are shown when a business is transferred, then section 197 is invoked.

The courts adopted a flexible approach in that it applied the facts of each case to section 197. It must be shown "that the business was transferred as a going concern and that a similar business is being conducted."[188] Once all factors are established, section 197 is triggered.

3.9 Conclusion

From the legal perspective, the Constitutional Court in *Aviation* has clarified "that it is not outsourcing as such or the 'generation' of the outsourcing that matters but whether there has been a transfer of the whole or part of a business, undertaking or service as a going concern."[189]

It is of no consequence if the outsourcing agreement is the first, second or tenth generation. If the "outsourced service is transferred and the facts show that the further transaction represents a transfer of a business as going concern, then section 197 applies."[190]

[184] Ibid.
[185] *Harsco Metals South Africa (Pty) Ltd & another v Arcelormittal South Africa (Pty) Ltd & others* [2012] 4 BLLR 385 (LC).
[186] *Aviation Union of SA & another v SA Airways (Pty) Ltd & others* (2011) 32 *ILJ* 2861 (CC).
[187] Note 157 above 52.
[188] Note 185 above.
[189] Note 186 above.
[190] Note 157 above, 52.

Chapter 4
Service Providers and Outsourcing

4.1 Introduction

In *NEHAWU v University of Cape Town and Another*,[191] the court held that outsourcing is a temporary arrangement, usually terminated at an agreed date and put out for a tender again when the date arrives. The Court in *NEHAWU* defined "outsourcing as something that involves putting out to tender of certain services for a fee. The contractor is paid for the outsourced services that it performs."[192]

The court concluded that outsourcing did not amount to a transfer in terms of section 197 and in differentiating outsourcing from a permanent transfer in terms of section 197 said the following:

> "In my view the sale of a business, legal transfer thereof to another employer or merger is markedly different to outsourcing. Outsourcing means putting out to tender certain services for a fee. The contractor performs the outsourced services and in return is paid a fee for its troubles by the employer. Where outsourcing occurs the employer pays the contractor a fee to render the services outsourced as opposed to paying salaries or wages to a group of employees to render the outsourced service. An outsourcing transaction is usually for a fixed period of time at the end of which it again goes to tender and the existing contractor could lose the contract to another contractor." [193]

According to the above, "the termination of a service contract and the subsequent awarding to a third party does not constitute a transfer in terms of section 197. The service provider whose contract has been terminated loses the contract but retains the business and can offer the same service to other clients with the same workforce."[194]

"The definition of business in section 197 includes a service."[195] What is being transferred "is not the service itself but the business that supplies the service."[196] If it was otherwise, "a

[191] (1) (2000) 7 BLLR 803 (LC).
[192] Ibid.
[193] *University of Cape Town and Others v NEHAWU* (2002) 4 BLLR 311 (LAC) 816.
[194] Ibid
[195] Note 116 above, 40.
[196] Note 116 above 52.

termination of a service contract by one party and its subsequent appointment to another service provider would constitute a transfer in terms of section 197." [197]

"This is not what the section was designed to achieve is apparent from its scheme, historical context and its purpose."[198] The "context referred to is the terms of the common law consequences on employment contracts when the ownership of the business changes hands."[199]

The proposition that is examined in this chapter with reference to various cases is whether the termination of a service or outsourcing arrangement that is subsequently awarded to a third party amount to a transfer as contemplated by section 197 of the Labour Relations Act 66 of 1995.

4.2 Analysis of cases

The cases of *Franmann Services (Pty) Ltd v Simba (Pty) Ltd* & another (2013) 34 *ILJ* 897 (LC); *Unitrans Supply Chain Solutions (Pty) and another v Nampak Glass (Pty) Ltd and Others* (2014) ILJ 2888 (LC) and *SAMWU & Others v Rand Airport Management Co Ltd (Pty) Ltd*[200] have established that this is a factual inquiry and depending on the facts, a termination of a service or outsourcing arrangement and subsequent awarding of the contract to a third party can in certain situations amount to a transfer contemplated by section 197. This is also emphasized by the general test for a transfer as set out by the Constitutional Court in *Aviation.*

In the context of service providers, the Labour Court in *Franmann Services* relying on *NEHAWU* (supra) stated that "the test to determine whether a business which includes a service has been transferred as a going concern must incorporate all the components of the transferring entity in order to establish whether after the transfer the entity is essentially the same."[201] This extends beyond the function being provided. This reflects the jurisprudence of the European Court of Justice. In *Suzen v Zehnacker Gebauderenigung GmbH Krankernhausservice* [1997] IRLR 255 the court held "that the mere fact that the service of the old and the new awardees of

[197] Note 116 above 52.
[198] *Aviation Union of SA & another v SA Airways (Pty) Ltd & others* [2011] 32 *ILJ* 2861 (CC) at 47 & 52.
[199] *Aviation Union of SA & another v SA Airways (Pty) Ltd & others* [2011] 32 *ILJ* 2861 (CC) at 47 & 52.
[200] (2005) 26 *ILJ* 67 (LAC).
[201] *Franmann Services (Pty) Ltd v Simba (Pty) Ltd* & another (2013) 34 *ILJ* 897 (LC) 12.

a contract is similar does not support the conclusion that an economic entity has been transferred – an entity cannot be reduced to the activity entrusted to it."[202]

Carlito Abler v Sodhexo MM Catering Gesellschaft GmbH [2004] IRLR 168, was a case "that concerned a change in service providers contracted to provide catering at a hospital. The court held that there was a relevant transfer in circumstances where the new contractor utilised substantial parts of the assets (the hospital kitchen and is equipment) previously used by the outgoing contractor but owned by the client. In effect, there was the transfer of a licence to use the client's facilities."[203]

The Labour Court, in *Franmann* found on the facts, "that there was no transfer of a business as a going concern for the purposes of section 197."[204] The Court said that the facts of the present case are not analogous to the cases cited, such as *Carlito* and *Suzen.* The applicant supplied only labour – it did not provide a service that requires the use of the first respondent's "infrastructure for the purposes of providing the contractual service."[205] Regarding the argument that the applicant's business was in itself "an economic entity capable of being transferred, it found that the applicant was to discontinue the business was adversely relevant."[206] Moreover, in the court's view there was no sufficiently significant business bundle that was to be the subject of a transfer. Importantly, there was no evidence that any assets, tangible or intangible, goodwill or rights or obligations were to be transferred. The fact that any of the second respondent's employees may be engaged on the same production line to perform the same tasks does not in itself trigger section 197.

In *CWU & others v MTN & another* (unreported case D377/11 of 23 May 2013) ["the MTN case"], the Labour Court found that "the termination of a service contract by MTN and the taking over of the service by MTN did not constitute a section 197 transfer."[207]

MTN owned a Call Centre in KwaZulu-Natal. It owned the building and all assets of the Call Centre. MTN and the second respondent concluded a "Call Centre Service Agreement" in

[202] Ibid
[203] *Franmann Services (Pty) Ltd v Simba (Pty) Ltd* & another (2013) 34 *ILJ* 897 (LC) 12.
[204] Note 203 above, 17.
[205] *Franmann Services (Pty) Ltd v Simba (Pty) Ltd* & another (2013) 34 *ILJ* 897 (LC) 12.
[206] Note 203 above, 15.
[207] *CWU & others v MTN & another* (unreported case D377/11 of 23 May 2013) 30.

2006. The agreement gave MTN the right to take over the payroll of the employees of the second respondent as well as the management, administration and control of the centre from the second respondent in the event of termination of the agreement. In 2012 MTN decided to run and manage the Centre and terminated the service agreement. MTN re-employed almost two thirds of the second respondent's employees but on different terms and conditions of employment. MTN began the recruitment process before its physical take-over of the centre. The Court concluded that no section 197 transfer had taken place.

It is submitted, with reference to the test for a transfer as set out in *Aviation* that the Court's decision and reasoning in *MTN,* on the facts, is incorrect on the following grounds.

The Court in *CWU* considered the applicable legal principles "in deciding whether the business has been transferred as a going concern."[208] These factors include tangible and intangible assets, whether the new employer takes over the worker, whether customers are being transferred and whether the new employer will be carrying on the same business.[209]

The Constitutional Court in *Aviation* stated that "for a transfer to be established the components of the original business in the form of assets or taking over of employees assigned to provide the service must be passed to the third party. [210]" The employees are transferred as they possess the necessary skill and expertise or the new owner requires the employees as it does not have any workforce. Section 197 affords the new owner protection. If the employees decline the offer of employment, then the new owner will be in a difficult situation. The fact that the transferee operates the same business is not the sole determination whether a transfer has taken place as a going concern. Other factors such as "whether assets, employees or customers were taken over by the new owner will also be considered to support the conclusion that when the business passed to the new owner it was transferred as a going concern."[211] It is submitted that, on the strength of the above dicta set out in *MTN* and *Aviation* case, there was a section 197 transfer in the *MTN* case.

[208] *CWU & others v MTN & another* (unreported case D377/11 of 23 May 2013) 22 and 23.
[209] *NEHAWU v University of Cape Town & others 2003* (24) ILJ 95 (CC).
[210] Note 116 above, 48 and 53.
[211] *Aviation Union of SA & another v SA Airways (Pty) Ltd & others* (2011) 32 *ILJ* 2861 (CC) 50.

The aspects of the business of the second respondent taken over by MTN included the management, administration and control of the centre, intangible assets and the second respondent's biggest resource, namely it's most skilled and experienced personnel. The second respondent was thus rendered nothing more than an empty shell with its core business (in fact it's only business) and its core staff having been taken over by MTN. It is suggested that the Labour Court set the bar too high in rejecting the proposition that the business of the second respondent had not been taken over as an "economic entity" by MTN.

In contrast, in *Harsco,* it was held that a transfer in terms of section 197 took place as Phoenix and Tube City had taken over some of Harsco's assets and employees. Van Niekerk concluded that in this case there was "an economic entity capable of being transferred which was in the form of Harsco's business operations."[212] Van Niekerk J made reference to the European jurisprudence, and the definition of "economic entity." At para 37, it was stated that when viewed cumulatively, the same services would be provided by the new services at the same locations and the same employees would be performing the same services. Therefore it was clear "that an economic entity existed which despite changes, remains identifiable though not necessarily identical after the transfer."[213] Section 197 applied to the termination of the service agreement between Harsco and Arcelormittal.

Applying *Harsco* to *CWU,* it is clear that an economic entity existed despite changes, remains identifiable and generally the same. The service that compromised Interaction's business (second respondent) would continue as a "discrete economic entity," [214] in MTN's hands.

It is submitted that the fact that the second respondent did not have its own infrastructure and utilised that of MTN is not conclusive or highly persuasive. Many service industries utilise assets of their clients in providing a service to them. This does not detract from the fact that the second respondent had tangible and intangible assets and human resources which were taken over by MTN. In light of this, a transfer had taken place.

[212] *Harsco Metals South Africa (Pty) Ltd & another v Arcelormittal South Africa (Pty) Ltd & others* [2012] 4 BLLR 385 (LC) 37.
[213] *Harsco Metals South Africa (Pty) Ltd & another v Arcelormittal South Africa (Pty) Ltd & others* [2012] 4 BLLR 385 (LC) 37.
[214] Ibid 39.

Similarly, the fact that not all employees were taken over by MTN is insignificant. MTN was in a position to select any of the employees from the second respondent. The fact that it selected only the most experienced and valuable personnel from among the second respondent's employees does not detract from the fact that it stripped the second respondent of both its core business and its most valuable human resources. MTN took over the management and administration of the services, operational methodology and goodwill.[215]

There was also evidence, which appears to have been accepted by the Court, that there was no interruption to the business of the Centre and it continued normally, mostly because of the operational know-how of the former employees of the second respondent who were re-employed by MTN and engaged in the training of new staff recruited by MTN. MTN ended up performing substantially the same or similar services to those previously rendered by Interaction.[216]

The Court further erred in finding that the service of the second respondent and the service now performed by MTN 'had similar features.' The function performed in house by MTN after the termination of its contract was identical to that offered by the second respondent. Again reference is made to *Harsco*. The main objective or the purpose of service provided by MTN continued to ensure that MTN's customers would have no technical or other obstacles in using the network. Both human and non-human resources went to MTN. At the end of the termination of the outsourcing, Interaction's (second respondent) business came to an end. The approach that was adopted by the Court is overly narrow on the facts. In essence, MTN continued to perform the same service as the second respondent, with only minor differences.

While it is accepted that any service provider, as set out in the judgment, is expected to have some management, administration and control skills and operational methodology, which does not necessarily qualify the service rendered as an 'identifiable business component", it is submitted that the comment by the Constitutional Court in *Aviation* is significant. A distinction must be drawn between a service provider who maintains its staff and methodology to service a number of clients (thus continuing its business when one client is lost) and one whose entire business is based on providing a service to one client. The facts of this case fall clearly into the

[215] *CWU & others v MTN & another* (D) unreported case D377/11 of 23 May 2013 12.
[216] *CWU & others v MTN & another* (D) unreported case D377/11 of 23 May 2013 13.

second scenario, and, by necessary implication, the transfer should be considered as one of a "going concern."

An additional consideration is that, due to the infinite number of factual situations which might arise when transfer of a business as a going concern is alleged, the law is necessarily stated only in broad terms which must be applied to every factual matrix.

The *MTN* case was successfully taken on appeal.[217] The Labour Appeal Court upheld the appeal and declared "that there was a transfer of a business as a going concern by the second respondent to the first respondent and that such transfer falls within the ambit of section 197 of the Labour Relations Act."[218] The second and further appellants were declared employees of MTN as of 1 December 2009 with no loss of service.

MTN argued that Interaction provided a service to MTN using their infrastructure. The core of the work had been performed by the agents and not the employees.[219] The Labour Appeal Court "rejected MTN's arguments that Interaction was merely providing a service to MTN using MTN's infrastructure, and this fell outside section"197."[220] According to Davis JA on the evidence, "Interaction was operating a call centre as a discrete business.[221]

"The Call Centre Service Agreement between the parties made it clear that the management, registration and control of the call centre were Interaction's sole responsibility, and that Interaction was operating the call centre as a discrete business."[222] This then transferred to MTN after the December 2010 changeover. Davis JA stated that the fact that it had but one client and operated a discrete business for this client should not detract from a conclusion that it was operating a call centre business which constituted a discrete business, sufficient to fall within the scope of section 197 of the LRA.[223]

The facts in MTN almost mirror those in the case of *Unitrans Supply Chain Solutions (Pty) and another v Nampak Glass (Pty) Ltd and Others* (2014) ILJ 2888 (LC) and yet the Labour

[217] *CWU & others v MTN & Interaction (Pty) Ltd* reportable case no DA 10/13 of 21 April 2015.
[218] 66 of 1995.
[219] *CWU & others v MTN & Interaction (Pty) Ltd* reportable case no DA 10/13 of 21 April 2015 14.
[220] *CWU & others v MTN & Interaction (Pty) Ltd* reportable case no DA 10/13 of 21 April 2015 21.
[221] *CWU & others v MTN & Interaction (Pty) Ltd* reportable case no DA 10/13 of 21 April 2015 21.
[222] Ibid
[223] *CWU & others v MTN & Interaction (Pty) Ltd* reportable case no DA 10/13 of 21 April 2015 21.

Court and the Labour Appeal Court in *TMS Group Industrial Services (Pty) Ltd t/a Vericon v Unitrans Supply Chain and Solution (Pty) Ltd* (2015) 36 ILJ 209 (LAC) came to the different conclusions.

Nampak was a manufacturer of glass products which was sold to customers such as breweries and food manufacturers. In 2011 Unitrans and Nampak concluded an agreement in terms of which Nampak outsourced the management and distribution operation of its warehouses to Unitrans. This entailed Unitrans providing the managers, logistical specialists, forklift operators and warehouse staff to run the warehouse and distribution operation, using Nampak's premises, assets and IT systems. This agreement was terminated at the end of January 2013 and the contract awarded to TMS. TMS commenced operations on 1 February 2014. The applicants sought "an order declaring the termination of the agreement between Nampak and Unitrans and the simultaneous appointment of TMS, a transfer for the purposes of section 197 of the LRA."[224]

In *Unitrans* Van Niekerk J articulated the issues to be determined as follows:

> What the case raises is the application of s197 where there is a change of service provider in circumstances where there are no assets that pass to the transferee, but the transferee assumes control of assets and equipment (the infrastructure) provided by the client and which is required for the services to be performed [at para 20].

Van Niekerk J relying on the facts found that:

> "The warehousing service which was provided by Unitrans to Nampak constituted an economic entity, or, put another way, an organised grouping of resources. This comprises, at least, the contractual right to perform the services, the assets owned by Nampak but used by the affected employees, the specific activities performed by the affected employees. This economic entity therefore constituted a service for the purposes of section 197."[225]

Prior to 1 February 2014, TMS employees observed the manner in which the prior workers [the affected employees] at the warehouse performed services. The purpose was to ensure a smooth transition when TMS commenced the services. TMS commenced the service on 1 February

[224] *Unitrans Supply Chain Solutions (Pty) and another v Nampak Glass (Pty) Ltd and Others* (2014) ILJ 2888 (LC) 2.
[225] *Unitrans Supply Chain Solutions (Pty) and another v Nampak Glass (Pty) Ltd and Others* (2014) ILJ 2888 (LC) 29.

2014, performing exactly the same tasks as those previously performed by the affected employees. TMS used the same assets (infrastructure) previously used by Unitrans to perform the service.

Van Niekerk J found that the activity of Unitrans constituted a business or entity with business components capable of being transferred and "that the termination of the warehousing agreement between Nampak and Unitrans and the conclusion of an agreement for the provision of similar services with TMS constitute a transfer in terms of section 197."[226]

Van Niekerk J found that the case in hand, fell within the scope of the principle established by *Sodexho*[227] "that a change in service providers triggered the equivalent of a section 197 transfer in circumstances where the incoming contractor is permitted the right of use of infrastructural assets owned by the client necessary for the purpose of continuing the relevant service."[228] Given the importance attached by the Constitution to comparative law and the application by the Constructional Court of the principles established by the ECJ in relation to the application of s197, Van Niekerk J found no reason to depart from this principle."[229]

The court at paragraphs 30-32 reasoned that TMS had the contractual rights to provide the warehousing services. The same assets were used to provide the same services and activities conducted on behalf of Nampak as those provided by Unitrans prior to 1 February 2014. The business performed by Unitrans transferred as a going concern to TMS. The infrastructure reverted to Nampak had been handed over to TMS. The court relied upon the decision of *Allen & others v Amalgamated Construction Co Ltd* [2000] IRLR 119 (ECJ) where the ECJ affirmed the principle that even if "ownership of the assets required to run an undertaking does not pass to the transferee, it is not decisive and does not preclude a transfer for the purposes of the Directive."[230] The comprehensive right of the use of the infrastructure and the assumption of control over that infrastructure are the key triggers.[231]

[226] Note 224 above 32 33.
[227] *Carlito Abler Sodexho and others v Sodexho MM Catering GesellschaftGmBH* [2004] IRLR 168.
[228] Note 224 above, 31.
[229] *Unitrans Supply Chain Solutions (Pty) and another v Nampak Glass (Pty) Ltd and Others* (2014) ILJ 2888 (LC) 31.
[230] Note 229 above 30.
[231] *Unitrans Supply Chain Solutions (Pty) and another v Nampak Glass (Pty) Ltd and Others* (2014) ILJ 2888 (LC) 32.

The court in *Unitrans* held that "there was a transfer as a going concern as TMS provided the same services from the same premises using the infrastructural assets without interruption."[232] Thus section 197 applied and the affected employees by operation of law were employed by law on the same terms and conditions by TMS.

This case was taken on appeal and dismissed on appeal. Davis JA quoted the *Aviation* case and referred to the European Law's Business Transfers Directive (2001/2003/EC). The learned judge stated that the approach adopted by the "European Court of Justice in *Sodexho*[233] accords with the approach that has been adopted to section 197 by the Constitutional Court in both *Aviation*[234] and *NEHAWU."*[235] Davis JA[236] concluded "that the business of the warehousing products was transferred as going concern based on the facts of the case."[237]

The *MTN* case is further compared to the case of *City Power (Pty) Ltd v Grindpal Management Services (Pty) Ltd and others* CCT 133/14 [2015] ZACC 8. In this case, City Power a state owned entity established in terms of the Municipal Systems Act 32 of 2000 and controlled by the City of Johannesburg awarded a tender in 2003 to Grindpal Energy Services. Grindpal argued that the continued performances of services either by City Power or a third party after the termination of the contract "amounted to a transfer of the business as a going concern in terms of section 197 while City Power contended that section 197 had not been triggered."[238]

The court had to consider "whether upon the termination of service level agreements, was there a transfer of a business as a going concern as contemplated by section 197 of the Labour Relations Act 66 of 1995."[239]

Grindpal supplied prepaid metering services. "The contracts came to an end in 2010 and additional contracts (service level agreements) were concluded in 2010 for a further 3 years."[240]

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[232] *Unitrans Supply Chain Solutions (Pty) and another v Nampak Glass (Pty) Ltd and Others* (2014) ILJ 2888 (LC) 32.
[233] Note 227 above.
[234] Note 116 above.
[235] Note 209, above.
[236] *TMS Group Industrial Services (Pty) Ltd t/a Vericon v Unitrans Supply Chain and Solution (Pty) Ltd* (2015) 36 ILJ (LAC) 209.
[237] Ibid
[238] *City Power (Pty) Ltd v Grindpal Management Services (Pty) Ltd and others* CCT 133/14 [2015] ZACC 1
[239] Ibid
[240] *City Power (Pty) Ltd v Grindpal Management Services (Pty) Ltd and others* CCT 133/14 [2015] ZACC 6

On 14 March 2012, City Power informed Grindpal in writing that the contract would be terminated immediately as Grindpal "allegedly submitted a fraudulent tax certificate."[241] The parties "agreed that as no new service provider was appointed at that time, the entire infrastructure, software and databases would be given to City Power."[242]

"City Power continued to run the business but denied that the employees who performed the functions of the business before the transfer were transferred to City Power together with business in terms of section 197."[243]

The Labour Court, held "that on the facts, the infrastructure for conducting business in question was temporarily in the hands of City Power."[244] The court "concluded that there had been a transfer in terms of section 197 with effect from 1 August 2012 and that the employees had been transferred to City Power."[245]

The matter was appealed. The Labour Appeal Court[246] dismissed the appeal and stated that on the facts of the case, a transfer had taken place. The entire operation was transferred to City Power and that the business was identifiable and discrete.[247] The same business was being conducted by a different entity. In a further appeal the Constitutional Court had to first decide whether section 197 was applicable to City Power and municipal entities and ruled that it was applicable unless such entities "specifically made provision for its exclusion in terms of section 197 (6)"[248],

In determining whether "there was a transfer of a business as a going concern, the court relied on the cases of *Aviation* and *NEHAWU*."[249] The Constitutional Court further made reference to the several factors listed by Grindpal in its founding affidavit (Labour Court) in support that there was a transfer in terms of Section 197.

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[241] Ibid 6.
[242] *City Power (Pty) Ltd v Grindpal Management Services (Pty) Ltd and others* CCT 133/14 [2015] ZACC 6
[243] *City Power (Pty) Ltd v Grindpal Management Services (Pty) Ltd and others* CCT 133/14 [2015] ZACC 6.
[244] *Grindpal Energy Management Services (Pty) Ltd v city Power Johannesburg* [2013] 1 BLLR 34 (LC).
[245] *City Power (Pty) Ltd v Grindpal Management Services (Pty) Ltd and others* CCT 133/14 [2015] ZACC 10.
[246] *City Power (Pty) Ltd v Grindpal Energy Management Services (Pty) Ltd and Others* (2014) 35 ILJ 2757 (LAC).
[247] *City Power (Pty) Ltd v Grindpal Management Services (Pty) Ltd and others* CCT 133/14 [2015] ZACC 25-26.
[248] *City Power (Pty) Ltd v Grindpal Management Services (Pty) Ltd and others* CCT 133/14 [2015] ZACC 34.
[249] *City Power (Pty) Ltd v Grindpal Management Services (Pty) Ltd and others* CCT 133/14 [2015] ZACC 36.

On the facts of the case, there was no dispute that City Power took over the full business "as is," with all the complex network infrastructure, assets, know-how and technology required to install and operate the prepaid electricity system with the clear intention of maintaining uninterrupted electricity services to Alexandra Township.[250] The business was the same save for being conducted by a different entity. Thus the appeal failed. The Court ruled "that there was a transfer of a business from Grindpal to City Power as a going concern and the contracts of employment of Grindpal's employees automatically transferred to City Power."[251]

When compared to *CWU/MTN,* it's clear that the courts will look at the substance and not the form of the transaction. The Court interpreted section 197 and concluded that the transfer had taken place as a going concern weighing each and every factor as contemplated in terms of section 197.

4.3 Conclusion

It is clear from the analysis of the above cases that the Constitutional Court decision of *Aviation* has had a significant impact on recent cases. It has been consistently applied to all cases including the latest *City Power* Constitutional Court case. From the *Unitrans* case, section 197 is triggered "when the transaction assumes the form of a transfer of the whole or part of the business is transferred as a going concern."[252]

It is clear that should the factors discussed in the *Unitrans* and *TMS* judgment be met, "a transfer of a going concern can be said to occur in outsourcing arrangements." [253] The *Unitrans* and *TMS* cases demonstrates the far-reaching ambit of section 197. Parties need to carefully analyze their contractual relationships in order to determine whether or not section 197 of the LRA may apply to their specific arrangement.

There are significant practical challenges which parties are confronted with when dealing with disputes of this nature. Wallis stated that the problem of the adequacy of the protection of workers in situations of outsourcing must be addressed by way of the constitutionality of

[250] Ibid 39.
[251] *City Power (Pty) Ltd v Grindpal Management Services (Pty) Ltd and others* CCT 133/14 [2015] ZACC 40.
[252] *Unitrans Supply Chain Solutions (Pty) and another v Nampak Glass (Pty) Ltd and Others* (2014) ILJ 2888 (LC).
[253] *TMS Group Industrial Services (Pty) Ltd t/a Vericon v Unitrans Supply Chain and Solution (Pty) Ltd* (2015) 36 ILJ (LAC) 197.

section 197 which involves a determination of the meaning of the section and a then a policy based criticism of that section.[254]

From the legal perspective, the *Aviation* case has clarified "that it is not outsourcing as such or 'generation' of the outsourcing that matters but whether there has been a transfer of the whole or part of a business, undertaking or service as a going concern."[255]

There is no clear picture as to the application of section 197 in relation to outsourcing as each case will depend on its facts. Foreign jurisdiction should be taken as a precedent. Some transactions that are usually characterised as involving outsourcing will be covered by section 197 and others will not.[256] The *CWU* case was successful on appeal. The principle established was "that a court is required to examine the substance of the agreement to determine whether an entity retains its identity after a transfer, so that it can be concluded whether the transferor carries on the same or similar activities with the same personnel and/or business assets, without substantial interruption."[257] This was further confirmed in the *City Power* Constitutional Court decision. These cases have shown that outsourcing agreements can amount to a transfer in terms of section 197. Applying the principles of section 197, courts have evaluated each case on its facts and with reference to the European jurisprudence and other important judgments. The termination of a service or outsourcing arrangement that is subsequently awarded to a third party amounts to a transfer as contemplated by section 197.

[254] M Wallis, 'It's not Bye-Bye to 'By': Some reflections on Section 197 of the LRA," (2013) *ILJ* 805
[255] Note 106, above.
[256] Note 222, above, 797.
[257] A Rycroft & B Robertson '*CWU & others v MTN & Interaction (Pty) Ltd* reportable case no DA 10/13 of 21 April 2015 available at http://www.worklaw.co.za/SearchDirectory/CaseLaw/C62.asp.

Chapter 5
Effects of Transfer

5.1 Introduction

This chapter discusses the effects a transfer has on a business and the consequences that flow thereafter. When a transfer takes place, section 197 must be followed. The conditions of employment may change but the employees must not be less worse off by the transfer. In this chapter, the effect and consequences of a transfer, the conditions of transferred employees and the obligations of the employer after transfer will be discussed with reference to case law. The chapter further provides the remedies which are available to the disgruntled employee.

5.2 Date of transfer

The court in Business *& Design Software (Pty) Ltd & another v Van der Velde*[258] noted that section 197 does not provide guidance as to when a transfer actually occurs.

It is imperative that the date of transfer be established, because the employees' contracts transfer on that date, and the consequences of the transfer takes effect on that particular date. If the employees agree prior to the transfer that they will transfer to the employer on reduced terms, they will transfer on those terms.

5.3 Effects and consequences of a transfer

The effect and consequences of a transfer is "that the new employer is automatically substituted in the place of the old employer."[259]

"Unless otherwise agreed to in a collective agreement:

5.3.1 The transferee [new employer] automatically becomes the employer of the employees of the transferor [old employer].

5.3.2 The contracts of employment of these employees are automatically transferred on the same terms and conditions to the new employer.

5.3.3 The contracts of employment remain the same. This means there is no break in employment and the years of service; and terms and conditions of employment remain the same.

[258] (2009) 8 BLLR 746 (LAC).
[259] Section 197 (2) (a) of the Labour Relations Act 66 of 1995.

5.3.4 All rights and obligations between the old employer and employees at the time of the transfer continue as rights and obligations between the new employer and the employees. This includes terms and conditions of employment, collective agreements, policies, rules, arbitrations awards, pending arbitration proceedings, labour court judgments, pending labour court cases."[260]

The new employer is now liable for any actions "that the employee had against the old employer – unfair dismissals, unfair labour practices and pending court matters."[261]

In *Foodgro, a division of Leisurenet Ltd v Keil,*[262] the court held that while an employer and an employee whose contract was transferred by virtue of section 197 (2) (a) could agree to new terms and conditions, the parties could not waive the provision concerning continuity of service.

Transferred employees are protected against dismissal by section 186(1) (f) and 187 (1) (g), of the Labour Relations Act which respectively defines dismissal as "the termination of contract of employment by an employee because the new employer after a transfer in terms of section 197 or section 197A, provided the employee with conditions or circumstances at work which are substantially less favourable to the employee than those provided by the old employer and render automatically unfair the dismissal of an employee for the reasons related to a transfer in terms of section 197."[263]

5.4 Conditions of transferred employees

The new employer does not need to provide the "identical terms and conditions of employment as those of the previous employer after the date of the transfer."[264] The conditions that the employees are on should not on the whole be "less favourable."

A new employer may, for example "offer transferring employees different terms and conditions of employment subject to the proviso that they are on the whole not less favourable than those

[260] Section 197 (2) of the Labour Relations Act 66 of 1995.
[261] Section 197 (2) (c) of the Labour Relations Act 66 of 1995.
[262] (1999) 20 *ILJ* 2521 (LAC).
[263] J Grogan, Workplace law 10 ed (2009) 301.
[264] Note 263 above, 302.

the employees enjoyed with the old employer."[265] This will be ascertained after "comparing the new terms and conditions of employment."[266]

"This provision will not apply to employees if any of their conditions of service are established by a collective agreement."[267] The new employer's flexibility is also limited in that terms and conditions contained in a collective agreement may not be varied without agreement to that effect.[268] The new employer can transfer the employees to different medical aid, provident and pension funds without the consent of the employees.[269]

5.5 Arbitration awards and collective agreements

The "new employer is bound by any arbitration award made in terms of the LRA and any collective agreements with the old employer."[270] This means that the new employer inherits all disputes that the employees had with the new employer. "The new employer is similarly bound by any collective agreement that bound the old employer immediately before the date of transfer in respect of the transferring employees."[271]

5.6 Duties of the Transferring Employer

There are various duties on the transferring employer as stated in section 197(7). "The old employer and the new employer must agree on the valuation of leave pay accrued to the transferring employees as well as the date of transfer, any severance pay that would have been payable by the old employer to the transferring employees affected by dismissals based on operational requirements and any other payments due to the transferred employees that have not been paid by the old employer."[272]

[265] C Bosh & Z Mohammed, 'Reincarnating the vibrant horse? The 2002 amendments and transfer of undertakings,' (2002) *Law, Democracy and Development,* Issue 1, Volume 6, 92.
[266] Ibid
[267] C Bosh & Z Mohammed, 'Reincarnating the vibrant horse? The 2002 amendments and transfer of undertakings,' (2002) *Law, Democracy and Development,* Issue 1, Volume 6, 92.
[268]C Bosh & Z Mohammed, 'Reincarnating the vibrant horse? The 2002 amendments and transfer of undertakings,' (2002) *Law, Democracy and Development,* Issue 1, Volume 6, 92.
[269] Section 197 (4) of the Labour Relations Act 66 of 1995.
[270] Section 197 (3) (b) (i) and (ii) of the Labour Relations Act 66 of 1995.
[271] C Todd, D du Toit, & C Bosch *Business Transfers and Employment Rights in South Africa* 1 ed (2004) 77.
[272] Note 263 above, 304.

This agreement must be in writing and must indicate which employer is liable for what payments and what provision has been made. All affected employees and the union must be made aware of this agreement.

5.7 Obligations of the Employers after Transfer

In terms of Section 197 (8), "for twelve months after the transfer, the old employer is jointly and severally liable with the new employer to any employee who is entitled to receive payment as a result of the employee's dismissal for a reason relating to operational requirements or liquidation or sequestration unless the employer is able to show that it has complied with section 197."[273]

Joint and several liability means that the claim/liability can be enforced against both the old and new employer [both are cited as respondents in the action] or against one of them. The old employer is only able to escape liability if he or she is able to establish that he or she is not liable for payment under the agreement described above.

5.8 Disputes that may arise and remedies

Automatically unfair dismissals disputes may arise "where employees are dismissed by the old or new employer and the reason for the dismissal is the transfer or a reason related to the transfer."[274]

Constructive dismissal disputes may "arise where an employee resigns because the new employer provides terms and conditions of employment or circumstances at work that are substantially less favourable than those provided by the old employer."[275]

Parties may apply for a declaratory order with request for substantive relief where it is submitted that there was a section 197 transfer of business but the old employer dismissed the employees and there was no transfer of the employees to the new business. The Labour Court can be approached to declare the transfer constituted a section 197 transfer and to order the transfer of the employees to the new business.

[273] Note 263 above, 304.
[274] Section 187 (1) (g) of the Labour Relations Act 66 of 1995.
[275] Section 186 (1) (e) of the Labour Relations Act 66 of 1995.

5.9 Conclusion

It is submitted that in terms of the above, it is important that "when a transfer as contemplated by section 197 takes place, parties follow the legislation."[276]

Any agreement concluded must be in writing and state all terms and conditions. Retrenchments must be carefully considered post the transfer. The employer cannot retrench the employees if they are aware a transfer is being contemplated. There are serious ramifications if section 197 is not followed as employees can lodge disputes to the Labour Court or CCMA.

It is recommended that during the transfer process, the affected employees are informed and advised about the possible changes that will occur due to a transfer and how it will affect them. The employees have a right to be consulted. All information must be disclosed to employees and their representatives to ensure effective negotiations so that the transfer can take place without any problems.

It is further recommended that a transfer should take place in terms of section 197 (6) so that a written agreement is concluded ensuring all issues are covered which will leave no room for any disputes. Section 197 (6) provides a powerful tool for ensuring that all affected parties get the best possible deal when a transfer contemplated by section 197 takes place.[277] The protection afforded by section 197 are indeed extensive.

[276] Section 197 of the Labour Relations Act 66 of 1995
[277] Note 265 above, 96.

Chapter 6

Section 197 Transfers in the Local Government Sector

6.1 Introduction:

In large establishments, transfers can become complex since the issue affects numerous and varied structures and categories of employees with different conditions of service. Besides the LRA, transfers are also subject to other legislation and various principles, set out further. Two practical case scenarios in the local government are examined in this chapter and have concluded that, considering the nature of governmental structures; transfers should be the subject of consultation and negotiations and processed in terms of a collective agreement concluded in terms of section 197(6) of the LRA.

The transfers in the local government sector have been examined to illustrate how transfers have been effected and the consequences thereof. Transfers can be effected in terms of section 197 (2) and (6) of the LRA.

Section 197 (6) (a) of the LRA states that when a written agreement is concluded, "the employer must disclose to the other person or body contemplated in subparagraph (ii), all relevant information that will allow it to engage effectively in the 'negotiations.'"[278] This makes it clear that the employers who are proposing such agreements must negotiate - not merely consult – with the employee parties."[279]

Section 197 is not inflexible and specifically provides for the agreed variation of some or all of its consequences. "The agreement must be in writing and be concluded between the old employers, the new employer or both of them acting jointly on the one hand and a consulting party defined by section 189 (1) (a) of the LRA on the other hand."[280]

Section 189 (1) of the LRA establishes a hierarchy of consulting parties. In local government the consulting parties would be the unions who are recognised as collective bargaining agents. Generally collective bargaining is about unions' negotiating terms and conditions of

[278] Note 263 above, 301.
[279] Note 263 above, 301.
[280] Section 197 (6) (a) (i) of the Labour Relations Act 66 of 1995.

employment on behalf of their members with employers. The unions therefore have a pivotal role in the process in that they have to ensure that the interests of their members are protected.

6.2 Case study one: Transfer of Nurses (Greater Kokstad Local Municipality)

Transfers in the local government sector has been discussed to highlight the impact of transfers in this sector.

The Transfer Framework to Facilitate Transfers of Personnel between spheres of Government,[281] principles must be complied with in that transfers must be done in compliance with section 197 of the LRA. The written agreement that is concluded must stipulate the terms and conditions of service, remuneration, liability of the employer and accrual of benefits.[282]

The principles further state that resources will follow the transfer of the function, that the employees will be transferred to the local level, the rules of the pension fund must be adhered to and that transferred employees will be guaranteed continued employment for a period of 12 months after the date of transfer.

The Kokstad clinic employees were transferred from the Greater Kokstad Local Municipality to the KwaZulu Natal Provincial Health Department in July 2006. Organised labour and the employers discussed concluding a section 197(6) agreement but this did not occur. As a result the transfer took place in a context of confusion and labour tension. Numerous disputes arose about macro and micro issues relating to allegations that:

1. There was no continuity of employment as the employees were put on probation;
2. The car allowance had been discontinued;
3. The old employer did not pay the employer's contributions of the Natal Joint Municipal Pension Fund;
4. The salary disparities were not addressed;[283]

[281]Prepared by the Department of Public Service & Administration dated April 2004.
[282] Principle 1 of the Transfer Framework to Facilitate Transfers of Personnel between spheres of Government.
[283] Legal opinion by Norton Rose Fulbright Attorneys.

These employees were treated as new employees and were not transferred on the same terms and conditions as previously applicable. The Municipality argued that employees had not been retrenched and therefore were not entitled to packages.

The employees did not approach the Labour Court to pursue any of the statutory remedies for breach in terms of section 197 of the LRA. Section 158 of the LRA allows for urgent applications to be bought before the Labour Court to issue a declaratory order to the effect that a transaction is affected by the section: a claim directing the employer to comply with the proper consequences of a section 197 transfer and claim for an automatically unfair dismissal on the basis that the employees were effectively employed as new employees. This is a dismissal in circumstances where an employee, post-transfer, resigns because the new employer provides "conditions or circumstances at work that are substantially less favourable than those provided by the old employer."[284]

Instead their union, Independent Municipal and Allied Trade Union referred a "mutual interest dispute to the South African Local Bargaining Council (hereinafter referred as the SALGBC) and a certificate was issued that the dispute could only be referred to strike or lockout."[285]

This misconceived dispute and referral led to protracted and futile discussions over a four year period between organised labour and the employer to resolve the grievances and disputes. In the end the legal claims prescribed[286] in August 2009.

The Municipality conceded in discussions that the transfer from the Kokstad Clinic to the Provincial Health Department was in contravention of section 197 of the LRA for the following reasons:

1. "The transferred employees were not transferred on terms and conditions less favourable than those they enjoyed at the municipality;
2. Despite agreement to do so, the Municipality did not enter into agreement with the Provincial Health Department in respect of the following;
   2.1 The leave pay accrued to the transferred employees of the Kokstad Clinic;

[284] Section 187 (g) of the Labour Relations Act 66 of 1995.
[285] Legal opinion by Norton Rose Fulbright Attorneys.
[286] Prescription Act 68 of 1969 as amended.

2.2 The severance pay that would have been payable to the transferred employees of the Municipality;

2.3 It failed to conclude a written agreement stipulating whether the Municipality or the Provincial Health Department was liable for paying leave, severance pay or any other amounts;

2.4 It failed to disclose the agreement; and

2.5 The employee's length of service was not recognised.[287]

Clearly, as legislation was not adhered to the employees that were transferred were left worse off. Their years of service were not recognised and this had an impact on their pension and salaries. The employees lost out on benefits (car allowance and pension) that were due to them.

The unions should have used collective bargaining to ensure that their members were not left worse off. Consultation and negotiations should have taken place with an aim of concluding an agreement.

The union should have also referred "an unfair dismissal in terms of section 187 (g) of the LRA; approached the Labour Court to enforce compliance with section 197 of the LRA, referred a dispute concerning the unilateral change to terms and conditions of service to the SALGBC or advise the employees to resign and claim constructive dismissal in terms of section 186 (e) of the LRA."[288]

6.3 Case study two: Transfer of nurses from Local municipalities to Department of Health

The failures of the above described transfer and the resultant labour tensions that arose forced organised labour and the employers to approach the next transfer with greater consideration and planning.

The nurses within the KwaZulu Natal local government who provided personal health in the KZN Region were transferred to the KwaZulu -Natal Department of Health in 2012. The transfer took place amid lengthy consultations, informative processes and ended in the parties

[287] Legal Opinion prepared by Norton Rose Fulbright Attorneys.
[288] Ibid

concluding a collective agreement to facilitate the transfer. The members were advised fully about the transfer process and signed forms mandating the union to sign the transfer agreement on their behalf. Prior to the transfer, the Department of Health had to ensure that all information in terms of salaries and benefits were correct. The South African Local Government Association (SALGA) sent a detailed questionnaire to the municipalities to ascertain if the affected employees were consulted with about the transfers and if not, reasons thereof. The following pertinent information was requested: the number of employees to be transferred and whether local shop stewards were consulted.

Consultation was important as SALGA wanted a smooth transition of the transfer. Consultation meetings took place in all affected municipalities with the employees, unions, SALGA and KZN Department of Health. The affected employees were advised of the process, the changes in working conditions and benefits. A comparison was done of the general benefits to inform the employees of the allowances that they would receive - home owner allowance, motor vehicles, night duty allowance, and overtime, uniform/protective and clothing allowance. A further comparison included the hours of duty, leave (vacation, sick, maternity, adoption, special, union office bearers, study, family responsibility, temporary and permanent incapacity), long service recognition, levy, medical aid, service bonus, pay date, pension fund, termination and union membership.

Significantly, a transfer agreement was concluded which covered all pertinent information including the annual service bonus, annual leave, other payments, retrenchments, early retirements, retired public service employees, medical aid, provident and pension fund, designation and titles.

The transfer agreement also provided for current disputes, performance agreements, and transfer of movable and immovable assets, breach, dispute resolution and arbitration.[289]

6.4 Comments

In the first case study, the transfer was amidst many problems and due to lack of consultation and various issues, the employees transferred had no recourse. The parties failed to conclude an agreement.

[289] Agreement of Transfer of Personal health services.

The second transfer was without any problems due to proper consultations and involvement of the unions. An agreement was concluded and the unions played a vital role in ensuring that their members were protected. The transferred employees were given information of the process and how they would be affected.

In the initial transfer, the unions failed to resort to collective bargaining to ensure their members' rights were protected. Collective bargaining is a process of decision-making between employers and trade unions acting on behalf of their members with the purpose of arriving at an agreement governing substantive and procedural terms of the relationship. All aspects of the employment situation can be the subject of collective bargaining.[290]

If the parties fail to come to an agreement, the trade unions have the power to sway decisions in its favour by ultimately resorting to industrial action.

6.5 Conclusion

Collective bargaining is a voluntary process and its purpose is to temporarily reconcile the conflicting interests of management and labour.[291]

The unions through collective bargaining can ensure that the rights of its members are protected. The transferred employees should not be left worse off by the transfer. There must be consultation between the parties to ensure effective negotiations. The employers must disclose all relevant information to the employees and their trade unions.

The unions can affect the transfer or the terms of the transfer through collective bargaining in two respects. Firstly, "if the transaction in terms of which business is transferred specifies that it is or will be transferred as a going concern, this term would constitute sufficient proof that the transfer is a section 197 transfer."[292]

[290] T Cohen, A Rycroft & B Whitcher, *Trade Unions and the Law in South Africa* (2009) 29.
[291] T Cohen A Rycroft & B Whitcher, *Trade Unions and the Law in South Africa* (2009) 29.
[292] T Cohen A Rycroft & B Whitcher, *Trade Unions and the Law in South Africa* (2009) 29.

This means the unions can intercede and negotiate for the transfer agreement/ transaction to include such a specific term, namely that the transaction "is a 'transfer of a business as a going concern.'"[293]

If this is done and a dispute arises as to whether the transfer constitutes a section 197 transfer, the above term in the transaction would be sufficient proof that the transfer is a section 197 transfer. This means there will be no need to prove all the other elements discussed before – eg that a business is in operation, namely an entity with components such as assets, goodwill, customers, infrastructure, obligations etc was taken over.[294]

If the outgoing employer refuses to agree to negotiate such a term with the transferee, the union can refer an interest dispute concerning a refusal to bargain to the CCMA or relevant bargaining council, obtain a certificate and issue a strike notice.[295]

Secondly, "section 197 (2) of the LRA permits the union, the employer and the transferee to conclude a collective agreement to vary some or all of the effects of a transfer."[296] This means that a union can push for a collective agreement which provides that the new employer will provide identical terms and conditions of employment to those employees of the previous employer after the date of the transfer. Alternatively, the union "can negotiate for other favourable terms and conditions of employment. The agreements must be in writing and must be concluded between the old employer, the new employer or both of them acting jointly and the union."[297]

[293] Section 197 (6) of the Labour Relations Act 66 of 1995.
[294] *Aviation Union of SA & another v SA Airways (Pty) Ltd & others* (2011) 32 *ILJ* 2861 (CC) 50.
[295] Section 64(1) (b) of the Labour Relations Act 66 of 1995.
[296] Section 197 (2) of the Labour Relations Act 66 of 1995.
[297] Section 197 (6) of the Labour Relations Act 66 of 1995.

Chapter Seven
Conclusion

This thesis has endeavoured to critically analyse the test set down by the Constitutional Court in the *Aviation* case regarding a transfer as contemplated by section 197 and also considers transfers in the context of large scale restructuring that has occurred (and continues to occur) in the South African local government sector.

Our case law, especially that of the Supreme Court of Appeal, the Constitutional Court and recent Labour Court decisions, reveals that our courts have adopted a purposive and value-based approach which advocates that the meaning of a right or words in a section of legislation must be established by an analysis of the purpose of the right or section in respect of the interests it was meant to protect. This approach facilitates business restructuring and job security. The Constitutional Court in *NEHAWU*[298] stated that "the main purpose of section 197 is to protect the workers against the loss of employment in the event of a transfer as a going concern." [299]

Todd et al says "that the very purpose of section 197 is to achieve continuity of the employment contract despite change in the identity of the employer." [300]

"Section 197 serves a dual purpose – it facilitates transactions while at the same time protecting workers against unfair job losses. It protects employees in two ways – by preventing employers from relying upon a transfer of any part of a business (whether by outsourcing or any other commercial transaction) to another employer as a basis for retrenching. Secondly by providing that where a transaction such as outsourcing occurs, that transaction cannot be used to reduce terms and conditions of employment."[301]

[298] NEHAWU v University of Cape Town & others 2003 (24) *ILJ* 95 (CC).
[299] NEHAWU v University of Cape Town & others 2003 (24) *ILJ* 95 (CC) 62.
[300] C Todd, D Du Toit D & C Bosch *Business Transfers and Employment Rights in South Africa* (2004) at 17.
[301] P Benjamin, 'A matter of Going Concern: Judicial interpretation and misinterpretation of section 197 of the Labour Relations Act' (2005) Volume 9, Issue 2, Law Democracy and Development 170.

The transfer in terms of section 197 is contemplated when all the elements are met. The courts have reiterated in various cases that "in deciding whether a business has been transferred as a going concern, regard must be given to the substance and not the form of the transaction."[302]

A business is transferred as a going concern when all the elements of the transfer are met. For section 197 to apply, "there must be a transfer of an identifiable business by the old employer to the old employer as a going concern."[303] Every case must be determined on the facts.

The Constitutional Court has also clarified the test for the application of section 197 and has importantly stressed that the application of section 197 must not be determined with reference to labels such as second or third generation but with reference to the express requirements listed in section 197. The Constitutional Court has adopted a purposive approach.

Recent case law, such as *City Power,*[304] *CWU,*[305] *Unitrans*[306] and *Harsco*[307] have also brought greater clarity and job security in cases where there is a change of service provider in circumstances where there are no assets that pass to the transferee, but the transferee assumes control of assets and equipment (the infrastructure) provided by the client and which is required for the services to be performed.

There is a fairly clear message that emerges from Constitutional Court decisions in *Aviation,*[308] *City Power*[309] and *NEHAWU,*[310] and the Labour Court decisions in *COSAWU*[311] and now *Franmann,*[312] *Harsco Metals*[313] and Labour Appeal Court of *Rand Airports,*[314] *TMS*[315] and

[302] Note 116 above, 51.
[303] *Aviation Union of SA & others v SAA (Pty) Ltd & others* (2008) 29 *ILJ* (LC) 32; *Aviation Union of SA & another v SA Airways (Pty) & Ltd others* (2011) 32 *ILJ* 2861 (CC) 17.
[304] *City Power (Pty) Ltd v Grindpal Energy Management Services (Pty) Ltd and Others* (2014) 35 ILJ 2757 (LAC).
[305] *CWU & others v MTN & another* unreported case D377/11 of 23 May 2013 12,
[306] *Unitrans Supply Chain Solutions (Pty) and another v Nampak Glass (Pty) Ltd and Others* (2014) ILJ 2888 (LC).
[307] *Harsco Metals South Africa (Pty) Ltd & another v Arcelormittal South Africa (Pty) Ltd & others* [2012] 4 BLLR 385 (LC)
[308] *Aviation Union of SA & another v SA Airways (Pty) Ltd & others* (2011) 32 ILJ 2861 (CC).
[309] *City Power (Pty) Ltd v Grindpal Management Services (Pty) Ltd and others* CCT 133/14 [2015] ZACC 8,
[310] Note 210 above.
[311] *COSAWU v Zikhethele Trade Pty (Ltd*) [2005] 9 BLLR 924 (LC).
[312] *Franmann Services (Pty) Ltd v Simba (Pty) Ltd* & another (2013) 34 *ILJ* 897 (LC) 12.
[313] Note 298, above.
[314] *SAMWU v Rand Airport Management Co (Pty) Ltd and others* [2005] 3 BLLR (LAC).
[315] *TMS Group Industrial Services (Pty) Ltd t/a Vericon v Unitrans Supply Chain and Solution (Pty) Lt*d (2015) 36 ILJ (LAC) 209.

CWU.[316] In most cases where outsourced work is put up for a fresh tender where the new service provider will be performing much the same services as the old service provider, and there is an intention that at least some employees and perhaps some assets move across, then section 197 will be activated. "This means that the new service provider must engage the whole workforce of the old service provider, and on the pre – existing terms and conditions of employment."[317]

The effects of a transfer have shown that there is a duty on the both the old and new employer to ensure that the transfer takes place smoothly. There must be complete disclosure of information to the unions and the affected employees in order to avoid disputes. The affected employees can lodge disputes to the CCMA, Bargaining Council or Labour Court.

The transfers in the local government sector highlighted the pivotal role that unions can play in the process. Collective bargaining can influence and impact on the process. In the case study discussed, the union failed to utilise collective bargaining to their advantage and their members were left worse off by the transfer process. The unions can resort to power play in future transfer processes to ensure that their members are protected and are transferred with their terms and conditions.

In summarisation, this thesis has analysed how courts have interpreted and applied Section 197 in light of the *Aviation* case. Cases are being taken on appeal with the appeal courts sometimes giving different results. The *Aviation* case has set a precedent on Section 197.

[316] *CWU & others v MTN & Interaction (Pty) Ltd* reportable case no DA 10/13 of 21 April 2015.
[317] *Harsco Metals South Africa (Pty) Ltd & another v Arcelormittal South Africa (Pty) Ltd & others* [2012] 4 BLLR 385.

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